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IN THE

Supreme Court of the United States

OCTOBER TERM, 1961

LOCAL 483, INTERNATIONAL BROTHERHOOD OF BOILERMAKERS, IRON SHIP BUILDERS, BLACKSMITHS, FORGERS & HELPERS OF AMERICA, AFL-CIO, RALPH SCHOENWEIS, E. C. JONES, KENNETH BEST, GEORGE A. CLAYTON, VICTOR COUCH, J. D. EVANS, FLOYD FRIEDLINE, SAMUEL R. GUARINO, MARION HOOPER, JOHN KLADAR, J. A. LANKFORD, JACK LAVITE, FRED G. MARCH, RALPH L. MILLER, RALPH RAMSIER, GEORGE STIMAC, and CHARLES TOWEY, *Petitioners,*

v.

NATIONAL LABOR RELATIONS BOARD, *Respondent,*

and

STANDARD OIL COMPANY, *Intervenor*
CENTRAL STATES PETROLEUM UNION LOCAL 115, *Intervenor*

PETITION FOR A WRIT OF CERTIORARI

To the United States Court of Appeals for the District of Columbia Circuit

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Local 483, International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers & Helpers of America, AFL-CIO, (hereinafter called Local 483), Ralph Schoenweis, E. C. Jones, Kenneth

Best, George A. Clayton, Victor Couch, J. D. Evans, Floyd Friedline, Samuel R. Guarino, Marion Hooper, John Klader, J. A. Lankford, Jack Lavite, Fred G. March, Ralph L. Miller, Ralph Ramsier, George Stimac and Charles Towey pray that a writ of certiorari issue to review the opinion (A-1-4, *infra*), and judgment (A-5, *infra*) of the United States Court of Appeals for the District of Columbia entered March 2, 1961.

OPINIONS BELOW

The opinion of the Court of Appeals is not yet officially reported. The decision and order of the National Labor Relations Board (A-6-16, *infra*) is reported at 127 NLRB 223; the decision of the Board in the representation proceeding involved herein is reported at 118 NLRB 1099.

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. 1254 (1). The Court of Appeals denied petitioners' petition for rehearing on March 22, 1961 (A-5, *infra*). On June 1, 1961, Mr. Chief Justice Warren entered an order extending to July 20, 1961, the time for filing a petition for writ of certiorari.

QUESTIONS PRESENTED

The questions presented are:

1. Whether an employer and the incumbent industrial union infringe the right freely to choose a bargaining agent by ceasing to recognize seniority, denying transfer privileges, threatening to terminate and terminating the non-craft employment of eligible voters in a craft severance election.

2. Whether the Board is empowered to legalize contractual arrangements pursuant to which, if the petitioner for severance wins, eligible voters are ousted from jobs within the incumbent's unit and replaced by employees who were not eligible to vote.

3. Whether the Board is empowered to sanction discrimination against employees involved in a severance proceeding by tolling the duty to bargain for them upon filing of the petition.

STATUTE INVOLVED

Principally involved in this proceeding are those sections of the National Labor Relations Act as amended in 1947 (49 Stat. 452, 29 U.S.C., Sections 151 et seq.) (hereinafter the Act) set forth in the Statute Appendix, pp. SA1-SA2, *infra*.

STATEMENT

A. The Stipulated Facts

In October, 1956, two months before expiration of the contract between Central States Petroleum Union (hereinafter CSPU) and Standard Oil Company (hereinafter Standard) covering the operating and maintenance (hereinafter o. and m.) unit at Standard's Wood River refinery, Local 483 filed with the National Labor Relations Board (hereinafter the Board) pursuant to Section 9 (c) of the Act a petition claiming the right to represent "all boilermaker department employees" (A-7-8; J.A. 119, 142, Exh. 2-S).[1] In Board parlance such a petition seeks "craft sever-

[1] References preceding the semicolon are to findings of the Trial Examiner, the Board and the court below; succeeding references are to the evidence. The designation "A" refers to the appendix to this petition; "J.A." references are to the Joint Appendix printed in the court below.

ance[2]. If the Board finds that the petition raises a "real question" of representation it will order an election in which the craftsmen choose between the craft and the industrial union. If the craft union wins, the "craft" is "severed" from the broader unit of which it has until then been a part. If a majority favor the industrial union the craft remains part of the larger unit. Similar terminology and procedure (known as "Globing," from its origin in *Globe Machine & Stamping Co.*, (1937) 3 NLRB 294), applies when a petition seeks to "sever" a plant from a multiplant unit, an employer from a multiemployer unit or a department from a plant unit.[2] Whether a petition for craft severance will be entertained and an election conducted depends on whether the Board finds that the employees involved are a "true craft."[3]

Shortly after the filing of the petition Standard notified CSPU that "to maintain a position of neutrality" it was "suspending all bargaining with you on new working agreement provisions and wages affecting the employees" involved in the boilermaker petition (A-8; J.A. 57-58). Standard thereby invoked the *Midwest Piping* doctrine[4] under which an employer faced with conflicting representation claims is required to refrain from bargaining with either claimant until the "question concerning representation" has been re-

[2] NLRB, *Third Annual Report* (Gov't. Print. Off., 1939), pp. 167-174.

[3] NLRB, *Twenty-fifth Annual Report* (Gov't. Print. Off., 1961), p. 38.

[4] *Midwest Piping and Supply Co.* (1945), 63 NLRB 1060.

solved.[5] CSPU agreed that the *Midwest Piping* doctrine was applicable and added that it would not "bargain with you on the subject of seniority until the Labor Board case [has] been disposed of. Conceivably the outcome * * * could force us to insist that the present seniority system be abandoned completely." (A-8; J.A. 59, Exh. 8-S, J.A. 109).

On May 3, 1957, Standard and CSPU entered into a new contract covering a bargain unit they defined as including "all operating and maintenance employees * * * exclusive of all employees involved in the representation case." (A-3, 8; J.A. 60, 109). The contract recognized the seniority of all employees in the unit and spelled out the historic perquisites of seniority (A-3, 8, 20-22; J.A. 49-52, 55): Employees were not confined to the division or department to which they were regularly attached. When work in a department or division slackened, surplus employees, selected in inverse order of department or division seniority, could elect, in preference to layoff, to "bump" into the "common labor pool". From the pool lay-offs would be made in inverse order of plant seniority when manpower exceeded total operating and maintenance needs. While working in the labor pool, employees were accorded the privilege of "bidding", in order of plant seniority, for permanent jobs and for temporary assignments to premium labor jobs in other

[5] Prior to 1958, however, the Board did not apply this doctrine to bargaining between an employer and an incumbent union, even where the unit petitioned for was coextensive with the existing one. *William D. Gibson Co.* (1954), 110 NLRB 660, overruled in *Shea Chemical Corporation* (1958), 121 NLRB 1027; NLRB, *Twenty-Fourth Annual Report* (Gov't. Print. Off., 1960), p. 60.

departments.[6] Option of return to their regular department or division could be exercised in order of division or department seniority.

CSPU and Standard made an oral "gentleman's agreement" that pending final disposition of the representation case the employees whom they had excluded from the unit by the terms of the May 3, 1957, contract would not, in practice, be denied transfer and bumping privileges, but they made no such agreement with respect to bidding rights (A-8-9; J.A. 60-61, 110).

In the representation case Standard and CSPU contended that the Local 483 petition should be dismissed on the ground that the boilermakers at Wood River were not confined to work on boilermaker jobs and therefore could not be considered a "true craft" (A-18; J.A. 84, 121, 122). In its decision on August 20, 1957, the Board, while noting that at the time the petition was filed 12 of the 42 employees on the boilermaker department seniority list had been "bumped back" and were working in labor pool jobs, rejected the Standard-CSPU contention because (J. A. 121-122) "these assignments result from decreases in work, are temporary in nature and are not considered a part of [boilermakers'] routine duties." (Cf. A. 12-13).

Before the election, which was held on September 19, 1957, CSPU warned the eligible voters that if Local 483 won the "gentleman's agreement" by which their seniority had been recognized would immediately come to an end. (A. 24, 36; J. A. 102). CSPU's President said that it "could not * * * ever agree that members

[6] While attached to the labor pool, employees were paid and classified in accordance with the job they were currently performing (A. 22, n. 5; J.A. 52).

of a separate boilermaker bargaining unit should retain or have seniority or job rights in the operating and maintenance unit". (J. A. 75). Standard said there was "insufficient boilermaker work for all 39 employees on the boilermaker seniority list," and, in view of CSPU's position, it "could see no alternative to the layoff of any persons considered eligible to vote in the boilermaker election for whom there was no boilermaker work available". (J. A. 74). CSPU said that for loss of their work in the labor pool the boilermakers would have only themselves to blame: "it will be only because you have shown by your vote that you want to be treated differently from the rest of the refinery employees". (J. A. 68). Standard said the bumped back boilermakers would be selected for layoff only because of the "employees' own majority decision to sever or cut themselves off from the operating and maintenance unit". (J. A. 86). Local 483 charged that these statements were "intimidatory and coercive," made "to influence the vote in the election" (J. A. 89), and were unlawful. (J. A. 93-94, 96-97).

At the election Standard challenged the eligibility of the seventeen boilermakers who were then working on labor pool jobs (A-9; J. A. 127). Tally of the unchallenged ballots showed nineteen for Local 483 and three for CSPU (A-9; J. A. 81). While the challenge issue was pending before the Board, four bumped back boilermakers, to avoid layoff in the event Local 483 was certified (A-36; J. A. 107), attempted to "bid" into permanent jobs in other departments (A-9-10; J. A. 112-114). Had their seniority been recognized, their bids would have been accepted. (A-23; J. A. 114). Asserting that acceptance would have "an adverse effect on the job rights and earning opportunities of the

members of the operating and maintenance unit whom we have the duty to represent," CSPU insisted that Standard reject these bids (A-24-25; J.A. 111-112, 114), and Standard complied. (*Ibid.*) Local 483 filed timely charges with the Board alleging that denial to the bumped back boilermakers of the benefits of the May 3, 1957, contract was unlawful (J.A. 106-107, 112-114).

On April 2, 1958, the Board overruled Standard's challenges and the votes of the bumped back boilermakers were counted. The revised tally showed 35 votes for Local 483 and 3 for CSPU (A-10; J.A. 99). On April 15, 1958, reiterating that it "would not condone the impairment of hard-won contractual job security rights by permitting seniority to cross bargaining unit boundaries" (J.A. 102), CSPU demanded that the bumped back boilermakers be laid off and replaced by junior employees whose seniority was recognized by the May 3, 1957 contract (A-10, 24; J.A. 102, 106). On April 17, 1958, as soon as Local 483 was certified, Standard did this (A-10; J.A. 105, 106). On April 18, 1958, unfair labor practice charges were filed on behalf of the laid off boilermakers and Local 483 (J.A. 106-107).

B. Opinions Below

The Trial Examiner found it "clear that CSPU caused the Company to remove the 17 employees from their jobs solely because they had elected to be represented by Local 483 in their boilermaker work assignments instead of by CSPU." (A-35, 29). He found that curtailment of the bumped-back boilermakers' seniority, whether treated "as an exclusion of 17 employees from the CSPU contract coverage, as a disparate treatment of a class of employees included in the

unit represented by CSPU, or as a sheer denial of employment" was "discrimination * * * which the Statute forbids" (A-34-35). In his view "No plainer violation of Section 8(a)(3) and 8(b)(2) can be stated" (A-26, 30).

The Board, saying that the Trial Examiner had "over-simplified the matter" (A-11), reversed. It held that severance had the effect of removing the bumped back boilermakers from the CSPU unit, and that CSPU was entitled to take action "detrimental" to them "on behalf of the employees it [still] represents" (A-11). It found the "differentiation in treatment" permissible, in the absence of specific proof of "unlawful animus" on the part of Standard toward Local 483, because it was "based on membership in a unit" (A-14-16), and was therefore "merely an effect of the severance action" (A-11). It held that exclusion of bumped back boilermakers from the May 3, 1957, contract was warranted by the *Midwest Piping* rule (A-13-14, 16), and that after severance craft employees must "look to their chosen bargaining representative with respect to any benefits sought to be obtained * * *" (A-11).

The court below described the *Midwest Piping* rule as requiring "an employer faced with rival representation claims * * * not to bargain with any union *as to the employees involved* in the representation dispute" (A-3, emphasis supplied) and concluded (A-4), that this case "reflects the difficult situations which often arise when craft severance requires readjustment of a highly complex seniority system". It held that the Board's resolution was "reasonable" and constituted "a proper accommodation of the interests which the Act seeks to serve."

REASONS FOR GRANTING THE WRIT

1. *Radio Officers' Union* v. *NLRB*, 347 U.S. 17, 45-47, 51-52, holds that any disparity of treatment based upon "protected union activity" is unlawful discrimination because the "foreseeable result" is to encourage or discourage that activity. That holding was rejected by the Board and the court below in this case on the ground that here the disparity followed "unit lines" and the union responsible "was not the exclusive bargaining agent of all employees concerned" (A-14-16, 11, 12). The Board relied on the reservation in *Radio Officers* (347 U.S., at 47-48), of the question whether a union can lawfully bargain for benefits only for its constituents where employees "doing the same job" (347 U.S., at 46), "are free to bargain for similar benefits for themselves" (347 U.S., at 47). But that reservation has no relevance where the benefits to the union's constituents are achieved at the expense of other employees. "Such discriminatory contracts are illegal and provide no defense to an action under Section 8 (a) (3)" (347 U.S., at 47-48). "The Union cannot exclude men in order to secure their jobs for others, for this would violate the duty of fair representation."[7]

In *Brotherhood of Railroad Trainmen* v. *Howard*, 343 U.S. 768, 773-774, this Court squarely held that the duty of a bargaining agent not to differentiate on forbidden grounds does not stop at the unit line. *Howard* holds that a bargaining agent must "refrain from using its statutory bargaining [position and] power" to take "jobs" away from workers outside its unit "in order to bestow them" on workers within it. Representation by another union in another unit, like race, is a forbidden ground: *Wallace Corp.* v. *NLRB*, 323 U.S.

[7] Blumrosen, *Legal Protection Against Exclusion From Union Activities*, (1961) 22 Ohio S.L.J. 21, 30.

248, 255-256; *Mount v. Grand International Brotherhood of Loc. Eng.*, 6 Cir., 226 F. 2d 604, 607, cert. denied, 350 U.S. 967.

Assuming that severance did remove the bumped back boilermakers from the o. and m. unit, the holding that OSPU was entitled to take action "detrimental" to them "on behalf of the employees it represents" (A-11), is thus in square conflict with *Howard*. It is also in conflict with *NLRB v. International Association of Machinists*, 9 Cir., 279 F. 2d 761, cert. denied, 364 U.S. 890, in which contractual reduction of seniority of employees outside the bargaining agent's unit because they had chosen to be represented by another union on jobs in a different unit was held unlawful.[7]

2. The basic assumption underlying the *Midwest Piping* defense is that when the Local 483 petition was filed the statutory obligation of OSPU to represent boilermakers as part of the o. and m. unit and the statutory duty of Standard to bargain with OSPU about the terms and conditions of their employment ceased. But the Seventh Circuit has recently held that in severance cases the *Midwest Piping* doctrine has no application until the Board finds that the petition raises a "real question" concerning representation and directs an election. *St. Louis Independent Packing Co. v.*

[7] If the unarticulated assumption underlying the Board's position is that OSPU's discrimination against the boilermakers should be excused because Local 483 could obtain a "similar benefit" for them by causing operating and maintenance employees from boilermaker jobs, the short answer is that if there had been any operating and maintenance employees on boilermaker jobs, which there were not, discrimination against them by Local 483 would have been no less violative of the Act than OSPU's discrimination against the boilermakers. Compliance with the prohibition against discrimination "is not achieved through indiscriminate imposition of inequalities." *Shelley v. Kraemer*, 334 U.S. 1, 22, cf. *RKO Pictures, Inc.*, 61 NLRB 112, 116.

NLRB, June 21, 1961, 7 Cir. F. 2d , 48 LRRM 2469, 2471. This threshold conflict affects the course of collective bargaining in every severance case and should be resolved promptly by this Court. Employers and incumbent unions should not be left to guess whether filing of a severance petition requires cessation of bargaining, for, if it does not, cessation violates the statutory duty to bargain," while if it does, continuation violates the rule.

If certiorari is granted petitioners will argue that in severance cases "neutrality" requires not that the incumbent union and the employer cease bargaining about the eligible voters but that they continue to treat them exactly the same, *vis-a-vis* other employees in the unit, as they have treated them in the past. This, of course, would prevent discrimination either for or against them and would preclude contractual arrangements under which benefits are made contingent upon the outcome of the election. As the Seventh Circuit noted in the *St. Louis Independent case*, *supra*, contractual schemes which do that "tend [ ] to preclude the certification of another union" (48 LRRM, at 2473) and thereby defeat the very object of the *Midwest Piping* rule.

Assuming, *arguendo*, however, that the Board is authorized to toll the duty to bargain about some aspects of employment of eligible voters in severance cases (*e. g.*, wages, it cannot be authorized to sanction disparity of treatment with respect to such matters as seniority, where, because rights and status are relative and interdependent, disparate treatment is necessarily

" *Brooks* v. *NLRB*, 348 U.S. 96, 103; *NLRB* v. *J. W. Rex Company*, 3 Cir., 243 F. 2d 356, 360-361.

and inevitably prejudicial. CSPU itself initially recognized that if bargaining were to proceed without boilermakers during the pendency of the representation case, the subject of seniority for everyone would have to be excluded, p. 5, *supra;* the Board and the court below nevertheless ignored this distinction (see NLRB, *Twenty Fifth Annual Report*, Gov't Print. Off., 1961, p. 65). "We need not pass on the Union's claim that it was not obliged to [bargain about seniority] at all because we are clear that once it undertook to bargain [about seniority] for some of the employees it represented it could not refuse to take similar action in good faith for other employees just because" they were eligible voters. *Conley* v. *Gibson*, 355 U.S. 41, 47. The prejudice resulting from vesting contractual seniority rights and status in everyone but eligible voters (cf. *Zdanok* v. *Glidden Co.*, 2 Cir., decided March 28, 1961, 47 LRRM 2865, 2868-2869), was not overcome by the "gentleman's agreement," for that served only partially to mitigate and to postpone the effects of the discrimination while at the same time compounding the pressure upon eligible voters. *St. Louis Independent case, ibid.* The "gentlemen's agreement" does show, however, that neither the parties nor the Board thought that the *Midwest Piping* doctrine required exclusion of eligible voters from the contractual seniority system.

3. The Board's treatment of the discrimination as a lawful product of unit lines conflicts with another fundamental anti-discrimination principle, namely, that bargaining units must be defined only in terms of jobs, never in terms of personal characteristics, union

affiliations or eligibility to vote.[10] To define inclusions or exclusions from a unit in non-job terms results automatically in disparate treatment of employees "doing the same job" and *ipso facto* violates the bargaining agent's duty of fair representation. Cf. *Brotherhood of Railroad Trainmen* v. *Howard*, 343 U.S. 768, 774-775.

Nothing in the nature of a severance proceeding could possibly warrant departure from this rule. The *Midwest Piping* policy bars pre-election negotiation only over conditions of employment in jobs which are the subject of the contest. It does not bar employment of eligible voters in jobs which are not the subject of the contest, nor does it authorize denial to them of whatever benefits may apply to or be negotiated for such jobs.[11] If Standard and CSPU had excluded boilermaker *jobs* rather than *eligible voters* from the unit coverage of their contract they would have satisfied the most stringent view of the requirements of *Midwest Piping* without creating any disparity as between eligible voters and other employees doing the same job. By phrasing the exclusion in terms of involvement in the proceeding, and thereby creating the disparity, they produced an election advantage for the contracting union at the expense of its rival, addi-

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[10] A bargaining unit consists of "a related group of jobs which may be held by members or non-members," adherents or opponents, of the union which controls those jobs. Blumrosen, *Legal Protection Against Exclusion from Union Activities*, 22 Ohio State L.J. 21, 23 (1961); *Carlisle & Jacquelin*, 55 NLRB 678, 680; *H. P. Wasson and Co.*, 105 NLRB 373, 374; *NLRB, Sixteenth Annual Report*, Gov't. Print. Off., 1952, p. 120.

[11] As the Trial Examiner observed, the seniority benefits which CSPU and Standard negotiated in the May 3, 1957 contract "related to" and were an "incident of" labor pool jobs, not boilermaker jobs (A-35).

tionally demonstrating why, in severance as in all other cases, eligibility to vote and the outcome of elections must be kept "off the bargaining table." *Felter* v. *Southern Pacific Co.*, 359 U.S. 326, 333-334.

4. The Board was apparently moved to treat ouster of the bumped back boilermakers as a consequence of severance rather than of discrimination by the argument that craftsmen should not be permitted after severance to enjoy any of the benefits of non-craft employment. As Standard put it in its brief below, p. 28, bumped back boilermakers should not be allowed to "effect the severance and thereby cut off the senior boilermakers from the o. and m. unit and not at the same time cut themselves off." But the cut off of contractual bumping and transfer rights between departments occurs by operation of law upon "certification of a different representative." *St. Louis Independent Packing Co.* v. *NLRB*, 48 LRRM, at 2472-2473. In order to make room for the new bargaining agent, the industrial union's contract must cease to apply to the craft jobs.[12] There is, however, no need whatever that it cease to apply to non-craft jobs. Removal of craft jobs from the coverage of the contract by operation of law terminates the contract right of operating and maintenance employees to be assigned to those jobs, just as it terminates the contract right of the craftsmen to bump into operating and maintenance jobs. But this mutual loss of interdepartmental transfer rights does not imply diminution of the statutory right to protection against discrimination. The employer and the incumbent union cannot superimpose on the legal effects of severance additional adverse con-

[12] *Local 1545, United Brotherhood of Carpenters & Joiners of America* v. *Vincent*, 2 Cir., 286 F. 2d 127, 131, n. 5; *American Seating Company*, 106 NLRB 250; *Ludlow Typograph Company*, 113 NLRB 724, 725, 728-729.

sequences merely because they consider such consequences fair and just (J.A. 78, 84, 92, 102).

The question is whether the conduct of the employer and the incumbent union invades rights protected by Section 7, not whether, as the Board thought (A-14, 16), the employer is motivated by anti-union animus on the one hand, or a desire to observe "neutrality" on the other. As this Court recently reiterated, "prohibited conduct cannot be excused by a showing of good faith." *ILGWU* v. *NLRB*, 366 U.S. —, No. 284, October Term, 1960, decided June 5, 1961; *Republic Aviation Corp.* v. *NLRB*, 324 U.S. 793, 802, n. 7, 805; *Wallace Corp.* v. *NLRB*, 323 U.S. 248, 252, 255-256; *Gaynor News Co., Inc.* v. *NLRB*, 347 U.S. 17, 46-48, 51-52.[13]

Where the employer and the incumbent union make continuation of non-craft employment contingent on the outcome of the severance election bumped back craftsmen are compelled to choose between freedom from discrimination in the non-craft jobs they hold and freedom to select a bargaining agent for the craft jobs to which they hope to return. But these rights are independent; both are guaranteed by the Act and loss of one cannot be made the price for enjoyment of the other. One right—to participate in the craft severance election—is accorded in recognition of the craftsman's interest in which union can best bargain with the em-

[13] *Republic* holds that an employer who prohibited wearing of union steward buttons in his plant in order to protect his neutrality thereby violated the Act; *Wallace* holds that an employer who entered into and permitted an incumbent union to enforce a contract under which adherents of a rival union were barred from employment violated the Act, although he opposed the union's policy and was powerless to require it to admit the discriminatees to membership; *Gaynor* holds that an employer cannot lawfully make or perform a contract with an exclusive bargaining agent for disparate treatment of union members and non-members doing the same work.

ployer over terms and conditions in craft jobs. The other—to be free from discrimination—is accorded in recognition of his interest as an individual and a member of a minority group in fair representation and equal treatment by those who control his non-craft job. There is not the slightest inconsistency or conflict between these rights which could preclude their simultaneous existence.

5. In the *St. Louis Independent Packing* case, 48 LRRM, at 2473, the Seventh Circuit held that "The fact that" the severable unit "had been grouped with others for bargaining purposes does not diminish the right of the * * * employees to change their bargaining representative at an appropriate time. The convenience of multi-unit bargaining and master contracts does not warrant infringement upon the rights of employees freely to choose their representative." The holding of the court below that "readjustment of complex seniority systems" does warrant infringement of freedom of choice is squarely in conflict. The question is not limited in importance to craft severance cases, although those bulk large enough.[11] Readjustment is

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[11] Papkin, *Craft Unit Versus Industrial Unit Bargaining Under The National Labor Relations Act* (1960), 29 Geo. Wash. L. Rev. 419, 430; *NLRB* v. *Industrial Rayon Corp.*, 4 Cir., decided June 12, 1961, 48 LRRM 2484.

An unpublished study by the Statistical Analysis Branch, NLRB, dated October, 1959, shows the following volume of Board directed severance elections:

	1954	1955	1956	1957	1958	1959
Severance—craft	28	41	23	22	20	17
Severance—department	14	42	22	18	13	15
Severance—other	0	5	1	4	7	3

These figures do not include cases in which severance petitions were disposed of by consent election, dismissal or withdrawal. Less than 20% of representation petitions are disposed of by Board-directed election. NLRB, *Twenty-Fifth Annual Report*, Gov't Print. Off. (1961) p. 189, table 10.

equally necessary in department, plant and employer severance cases, where seniority systems are also frequently unit wide.[15]

In treating "full freedom" of choice of a bargaining agent (*Hill* v. *Florida*, 325 U.S. 538, 541) as subject to "reasonable" limitations and to the process of "accommodation" the court below confused the guarantee against discrimination based upon exercise of Section 7 rights, which is not subject to administrative or judicial limitation (*Radio Officers' Union* v. *NLRB*, 347 U.S. 17, 26), with organizational activities, such as solicitation of union membership on the employer's property, which are protected by Section 7 only within "reasonable" bounds. Cf. *NLRB* v. *Babcock & Wilcox Co.*, 351 U.S. 105. Having in 1947 admonished the Board to allow craftsmen opportunity to decide the severance issue in an election (*American Potash & Chemical Corp.*, 107 NLRB 1418, 1420, 1422-23; S. Min. Rep. No. 105, on S. 1126, p. 11, 1 Leg. Hist. LMRA, 473; 93 Cong. Rec. 3836, 2 Leg. Hist. LMRA, 1009), Congress cannot be deemed to have authorized it to diminish their actual freedom of choice by permitting the election to be made an occasion for discrimination. Protection against discrimination "is an inevitable corollary of the principle of freedom of organization." *Phelps Dodge Corp.* v. *NLRB*, 313 U.S. 177, 185. The Board cannot sanction any abridgment of the voter's freedom to cast his ballot "without imperilling [his] livelihood" or "affecting his job". *Radio Officers' Union* v. *NLRB*, 347 U.S. 17, 40, 42.

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[15] *Analysis of Layoff, Recall, and Work-Sharing Procedures in Union Contracts*, U.S. Dept. of Labor Bull. No. 1209 (1957), p. 25, Tables 18 and 19.

6. The impact of this decision upon craft severance is as broad as it is devastating. A bumped back craftsman's non-craft job is his current source of livelihood.[16] To sanction his ouster from that job if a majority vote for severance is virtually to compel him to vote against it, for "the desire of employees to unionize is directly proportional to the advantages thought to be gained from such action." *Radio Officers' Union* v. *NLRB*, 347 U.S., at 46, 51-52.

As the court below observed, situations in which temporarily bumped back craftsmen are eligible to vote in severance elections "often arise." Interdepartmental bumping is a common feature of collective bargaining contracts in integrated industry. Bumping is provided for in "54% of agreements * * * the percentage being higher in manufacturing (63 per cent), lower in non-manufacturing (27 per cent) * * *. Almost ⅗ of bumping provisions allow plant-wide bumping." BNA, Collective Bargaining Negotiations and Contracts, Sections 60:241, 75:5; *Analysis of Layoff, Recall, and Work-Sharing Procedures in Union Contracts*, U.S. Dept. Labor Bull. No. 1209 (1957), p. 27. In all such cases, bumped-back craftsmen may hold the balance of power in the election as they did here.

Review now is necessary if the right to craft severance is to survive. Unless this decision is reversed, the General Counsel of the Board will consider himself bound by it and will not issue complaints on charges of discrimination predicated on termination of eligible voters' non-craft employment. Since the General Counsel's refusal to issue a complaint is not reviewable,

[16] At the time of the election six of the bumped-back boilermakers had not worked on boilermaker jobs for a year to two years (A. 22; J.A. 127-128).

either by the Board or by the courts,[17] no occasion to consider the Board's approach will be presented.

CONCLUSION

For the foregoing reasons it is respectfully submitted that this petition for writ of certiorari should be granted.

Respectfully submitted,

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[17] *Bandlow* v. *Rothman*, D.C. Cir., 278 F. 2d 866, cert. denied 364 U.S. 909; *Hourihan* v. *NLRB*, D. C. Cir., 201 F. 2d 187, 188, cert. denied 345 U.S. 930.

STATUTE APPENDIX

Sec. 7. Employees shall have the right to self organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8 (a) (3).

Sec. 8 (a). It shall be an unfair labor practice for an employer—

> (1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7;
>
> (2) to dominate or interfere with the formation or administration of any labor organization or contribute financial or other support to it * * *;
>
> (3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization * * *
>
> (5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 9 (a).

Section. 8 (b). It shall be an unfair labor practice for a labor organization or its agents—

> (1) to restrain or coerce (A) employees in the exercise of rights guaranteed in section 7 * * *

(2) to cause or attempt to cause an employer to discriminate against an employee in violation of subsection (a)(3) * * *

(3) to refuse to bargain collectively with an employer, provided it is the representative of his employees subject to the provisions of section 9 (a) * * *

Sec. 9 (a). Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in a unit appropriate for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment: * * *

(b) The Board shall decide in each case whether, in order to assure to employees the fullest freedom in exercising the rights guaranteed by this Act, the unit appropriate for the purposes of collective bargaining shall be the employer unit, craft unit, plant unit, or subdivision thereof: *Provided*, That the Board shall not * * * (2) decide that any craft unit is inappropriate for such purposes on the ground that a different unit has been established by a prior Board determination, unless a majority of the employees in the proposed craft unit vote against separate representation * * *

(c) (1) Whenever a petition shall have been filed * * * [i]f the Board finds * * * that * * * a question of representation exists, it shall direct an election by secret ballot and shall certify the results thereof.

APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 15850

LOCAL 483, INTERNATIONAL BROTHERHOOD OF BOILERMAKERS, IRON SHIP BUILDERS, BLACKSMITHS, FORGERS & HELPERS OF AMERICA, AFL-CIO, ET AL., *Petitioners*

v.

NATIONAL LABOR RELATIONS BOARD, *Respondent*

STANDARD OIL COMPANY OF INDIANA, *Intervenor*

CENTRAL STATES PETROLEUM UNION LOCAL 115, *Intervenor*

On Petition for Review of an Order of the
National Labor Relations Board

Decided March 2, 1961

Mr. Mozart G. Ratner for petitioners.

Mr. Frederick U. Reel, Attorney, National Labor Relations Board, for respondent. *Messrs. Stuart Rothman*, General Counsel, National Labor Relations Board, *Dominick L. Manoli*, Associate General Counsel, National Labor Relations Board, *Marcel Mallet-Prevost*, Assistant General Counsel, National Labor Relations Board, and *Herman M. Levy*, Attorney, National Labor Relations Board, were on the brief for respondent.

Mr. Karl H. Mueller for intervenor, Standard Oil Company of Indiana.

Mr. Gerard D. Reilly was on the brief for intervenor Central States Petroleum Union Local 115. *Mr. Laurence T. Zimmerman* also entered an appearance for intervenor, Central States Petroleum Union Local 115. *Mr. Fred H. Daugherty*, a member of the bar of the Supreme Court of Illinois, was allowed to appear *pro hac vice* for intervenor Central States Petroleum Union Local 115.

Before PHILLIPS, *Senior United States Circuit Judge for the Tenth Circuit*,* and PRETTYMAN and BAZELON, *Circuit Judges*.

PER CURIAM: Petitioners are Local 483, International Brotherhood of Boilermakers, et al., a craft union, and seventeen employees of the Standard Oil plant at Wood River, Illinois. They seek to set aside an order of the National Labor Relations Board which dismissed complaints against the Company and Central States Petroleum Union (CSPU), an industrial union representing the operating and maintenance employees at the Company's Wood River plant. The detailed factual situation giving rise to these complaints is fully set forth in the Board's opinion, *Local 115, Central States Petroleum Union*, 46 L.R.R.M. 1001 (1960). In essence, petitioners contend that the denial of job transfer requests by several of the individual petitioners and the layoffs of all seventeen were the result of discriminatory conduct of the Company and CSPU and constituted unfair labor practices under the National Labor Relations Act.[1]

The seventeen individual petitioners had been employed in the Company's boilermaker department and temporarily assigned to other operating and maintenance tasks.

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* Sitting by designation pursuant to Sec. 294(d), Title 28, U. S. Code.

[1] Specifically, the complaint charged Standard with violations of §8(a)(1), (2), and (3) and CSPU with violation of §8(b)(1)(A) and (2) National Labor Relations Act, 49 Stat. 452 (1935), as amended, 29 U.S.C. §158 (1958).

In spite of their temporary jobs, the Board had determined that they were members of the boilermakers unit for purposes of the craft severance proceeding[2] initiated by Local 483. The denials of the job transfer requests occurred after the severance proceeding had been initiated but before the election. The layoffs occurred after Local 483 was successful in the election and the boilermakers unit, then represented by Local 483 instead of CSPU, was severed from the operating and maintenance unit represented by CSPU.

While the craft severance election was pending, the collective agreement between the Company and CSPU expired and a new agreement was made. This agreement, which included the seniority rules governing job transfer requests and layoffs, specifically excluded employees eligible to vote in the boilermakers unit election, including the seventeen petitioners. Accordingly, the Company subsequently denied the job transfer requests involved here.

The Board concluded that the exclusion which brought about this denial was proper in light of the policy of its *Midwest Piping*[3] rule which requires an employer faced with rival representation claims to maintain a strictly neutral position and not to bargain with any union as to the employees involved in the representation dispute. Similarly, the Board concluded that all members of the newly created craft unit, including the seventeen individual petitioners temporarily working outside of it, had only such seniority rights as their new bargaining representative obtained for them. It therefore held that the seventeen were without seniority on their temporary operating and maintenance jobs as a consequence of sev-

[2] This term, in Board parlance, signifies the removal as a result of an election of a craft group from a broader bargaining unit of which it was previously a part. See *American Potash & Chemical Corp.*, 107 N.L.R.B. 1418 (1954).

[3] *Midwest Piping and Supply Co.*, 63 N.L.R.B. 1060 (1945).

erance, and the layoffs were not occasioned by prohibited conduct.

This case reflects the difficult situations which often arise when craft severance requires readjustment of a highly complex seniority system.[4] We think the Board's resolution is a reasonable one and reflects a proper accommodation of the interests which the Act seeks to serve.

Affirmed.

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 15,850

LOCAL 483, INTERNATIONAL BROTHERHOOD OF BOILERMAKERS, IRON SHIP BUILDERS, BLACKSMITHS, FORGERS & HELPERS OF AMERICA, AFL-CIO, ET AL., *Petitioners*,

v.

NATIONAL LABOR RELATIONS BOARD, *Respondent*,

STANDARD OIL COMPANY OF INDIANA, CENTRAL STATES PETROLEUM UNION, LOCAL 115, *Intervenors*

On Petition for Review of an Order of the National Labor Relations Board

Before: PHILLIPS, *Senior United States Circuit Judge for the Tenth Circuit*, and PRETTYMAN and BAZELON, *Circuit Judges*.

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[4] See Jones, *Self-Determination v. Stability of Labor Relations*, 58 MICH. L. REV. 313 (1960); Cox, *The Legal Nature of Collective Bargaining Agreements*, 57 MICH. L. REV. 1, 12, (1958).

Judgment

This case came on to be heard on the record from the National Labor Relations Board, and was argued by counsel.

On Consideration Whereof, it is ordered and adjudged by this court that the order of the National Labor Relations Board on review in this case is affirmed.

Per Curiam.

Dated: Mar. 2, 1961

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 15,850

Local 483, International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers & Helpers of America, AFL-CIO, et al., *Petitioners*,

v.

National Labor Relations Board, *Respondent*,

Standard Oil Company of Indiana, *Intervenor*,

Central States Petroleum Union Local 115, *Intervenor*.

Before: Phillips, *Senior Circuit Judge*, sitting by designation and Prettyman, and Bazelon, *Circuit Judges*, in Chambers.

Order

Upon consideration of the petitioners' petition for rehearing, it is

Ordered by the court that the petition for rehearing is denied.

Per Curiam.

Dated: March 22, 1961

127 NLRB No. 31

D-1308
Chicago, Illinois

UNITED STATES OF AMERICA

BEFORE THE NATIONAL LABOR RELATIONS BOARD

CENTRAL STATES PETROLEUM UNION, LOCAL 115, *Respondent*

AND

GRUENBERG & SCHOBEL, *Attorneys, Charging Parties*

AND

Cases Nos. 14-CB-515, 582, 581, 604, 656

LOCAL 483, INTERNATIONAL BROTHERHOOD OF BOILERMAKERS, IRON SHIP BUILDERS, BLACKSMITHS, FORGERS, AND HELPERS OF AMERICA, AFL-CIO, *Charging Party*

AND

RALPH SCHOENEWEIS, *An Individual, Charging Party*

AND

E. C. JONES, *An Individual, Charging Party*

STANDARD OIL COMPANY, *An Indiana Corporation, Respondent*

AND

Cases Nos. 14-CA-1712, 1737, 1836, 1837, 1877, 1938

LOCAL 483, INTERNATIONAL BROTHERHOOD OF BOILERMAKERS, IRON SHIP BUILDERS, BLACKSMITHS, FORGERS, AND HELPERS OF AMERICA, AFL-CIO, *Charging Party*

AND

GRUENBERG & SCHOBEL, *Attorneys, Charging Parties*

AND

RALPH SCHOENEWEIS, *An Individual, Charging Party*

AND

E. C. JONES, *An Individual, Charging Party*

Decision and Order

(Issued April 15, 1960)

On March 3, 1959, Trial Examiner Thomas A. Ricci issued his Intermediate Report in the above-entitled proceeding, finding that the Respondents had engaged in and were engaging in certain unfair labor practices and recommending that they cease and desist therefrom and take certain affirmative action, as set forth in the copy of the Intermediate Report attached hereto. Thereafter, the Respondents filed exceptions to the Intermediate Report and supporting briefs. On October 6, 1959, the parties participated in oral argument before the Board in Washington, D. C.

The Board has considered the Intermediate Report, the exceptions and briefs, the oral argument, and the entire record in these cases. We find merit in the exceptions and accordingly adopt the findings and conclusions of the Trial Examiner only insofar as they are consistent with our decision herein.

Background. The instant cases are an outgrowth of a representation proceeding commenced in October 1956 when Local 483[1] filed a petition with the Board to sever all boilermaker department employees from an existing operating and maintenance unit at Standard's Wood River, Illinois, refinery. (Severance petitions for other departments were also filed, but these ultimately were either dismissed or withdrawn.) When Local 483's petition was filed, and for a number of years before, all employees in the o. and m. unit, including the boilermakers, were represented by CSPU. CSPU had previously given Standard notice to

[1] The charging party Local 483, International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers and Helpers of America, AFL-CIO, is referred to herein as Local 483; Respondent Standard Oil Company is referred to as Standard; and Respondent Central States Petroleum Union, Local 115 is referred to as CSPU.

terminate, effective December 27, 1956, its current collective bargaining agreement; and on the filing of the severance petitions, CSPU advised Standard that it was suspending bargaining with Standard respecting employees "involved" in the representation proceedings. Following a period of negotiation, CSPU and Standard entered into a new contract on May 3, 1957, covering employees in the o. and m. unit, but specifically excluding those "involved" in the pending representation proceedings.

Like the previous agreement, the new contract provided for the accumulation of plant, divisional, and departmental seniority, and specified how such seniority could be exercised. In essence, it was provided that every employee began to acquire plant seniority from his date of hire. On began to acquire plant seniority; an employee would begin entrance into one of the divisions, an employee would begin to acquire, in addition to his plant seniority, seniority within that division. By moving into a department, he would begin to acquire seniority within that department. An employee's seniority standing in his department, in his division, and in the plant governed both his security in his job and his opportunity to advance within his own division and department. If, in the event of a layoff within his own division or department, an employee lacked sufficient seniority to retain employment there, he could "bump back" to a "labor pool", and, by exercising his plant seniority, displace employees within the pool having less plant seniority. By exercising his plant seniority or divisional seniority, an employee could also "bid" for transfers to other jobs in other departments or divisions. Once transferred, however, an employee would lose all seniority accumulated in his former department or division, and would start anew to acquire seniority in his new department or division.

As noted, the 1957 contract excluded from its coverage all employees involved in the then pending representation proceedings. However, simultaneously with the signing of this contract, CSPU and Standard orally agreed (termed a

"gentlemen's agreement") that pending disposition of the representation proceedings, the excluded employees would be treated as though they had the same rights which they had had under the expired contract in respect to "bumping back" to the labor pool; but no agreement was made respecting any right to "bid" into other departments. Shortly after the signing of the new contract, Standard unilaterally extended to the excluded employees the wage increases and other benefits given to the covered employees.

On August 20, 1957, the Board directed an election among the boilermaker department employees (*Standard Oil Company*, 118 NLRB 1099). The election was held on September 19, 1957, and of the 22 employees then working in the boilermaker department, 19 voted for Local 483, and 3 voted for CSPU. Of the remaining 18 carried on the boilermaker seniority list, none of whom was then working in the boiler-

for CSPU. Of the remaining 18 carried on the boilermaker

seniority list, none of whom was then working in the boilermaker department, one (E. C. Jones) did not attempt to ed, and the vote, another did not vote because he had retires and the ballots of 16 were challenged by Standard. Jon sed back to boilermaker 16 challenged employees had previously bumpe the labor pool because of a slackening in b bid into the department work. ones had no

On October 24, 1957, E. C. Jones attempted to by their earlabor pool. CSPU advised Standard that Jon any bid by "bidding" rights because he was not covered by uld feel free rent contract, and that if Standard honored a compliance anyone not covered by that contract, CSPU woul to use "legal and economic remedies" to compel or concluded with the contract. Jones' bid was denied. e overruled.

On November 5, 1957, the Regional Director the Board a that the challenges to the 16 ballots should be tition, or, in On November 12, 1957, Standard filed with the arifying the motion for dismissal of the representation peti ing rights of the alternative, for a supplemental decision cla motion was Board's unit finding and defining the bargainin a certified labor organization. Standard's n

denied.[2] In February 1958, while Standard's motion was pending before the Board, Jones and other boilermakers then working in the labor pool (Schoeneweis, Best, Miller and Lankford) attempted to bid into other promotional groups and departments in the o. and m. unit. All bids were denied.

In April 1958, the Board overruled the challenges to the 16 ballots and ordered them to be counted. A revised tally of ballots showed 35 votes for Local 483 and 3 for CSPU. After the tally issued, CSPU advised Standard that when the Board certified Local 483, all boilermakers working in the labor pool would have to be replaced by o. and m. employees then in a layoff status; and if this were not done, CSPU would strike the refinery.

On April 17, 1958, the Board certified Local 483 as representative of the boilermaker unit. On that date each of the 17 boilermakers then working in the labor pool (as the result of having been bumped back) was laid off and replaced by a recalled o. and m. employee. The group laid off included 2 employees who were actually working in the boilermaker department at the time of the election, but who had been bumped back to the labor pool subsequent to that date.

On the basis of the foregoing, the Trial Examiner found that by causing Standard to layoff 17 employees on April 17, 1958, and by causing Standard to reject certain[3] bids

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[2] Standard's motion (in which CSPU subsequently joined in part) was denied on March 26, 1958.

[3] The Trial Examiner found no violation in the denial of Jones' bid of October 1957 in that the labor pool was not a department or promotional group into or out of which *any* employee could bid. The Trial Examiner also found that the denial of Miller's bid was not violative of the Act. It was conceded by the General Counsel that this employee lacked sufficient seniority even if covered by CSPU's contract to be entitled to the transfer sought.

We adopt the Trial Examiner's findings here not only for the reasons given, but for the additional reasons set forth in this decision.

of employees for transfer, CSPU violated Section 8 (b) (2) and 8 (b) (1) (A) of the Act; and that by so laying off and denying the transfers, Standard violated Section 8 (a) (1), (2) and (3) of the Act. We disagree with these findings.

1. In finding that the layoff of the 17 boilermakers violated the Act, the Trial Examiner reasoned that because no layoffs would have been made if the boilermakers as a group had not voted for Local 483, the boilermakers were unlawfully laid off for that reason—i. e. for voting for Local 483. In our view, the Trial Examiner has oversimplified the matter and in so doing has failed to give proper recognition to the nature of a craft severance proceeding. What the Trial Examiner has interpreted as unlawful causation is, in our opinion, merely an effect of the severance action. We find, in the circumstances of this case, that severance having been effected, the craft employees had to look to their chosen bargaining representative with respect to any benefits sought to be obtained thereafter. The rejected representative continuing, however, to represent the employees in the unit who were not severed, may at times be compelled to take action on behalf of the employees it represents which may be detrimental to the severed employees no longer in its unit. Thus, in the instant case, CSPU had a contract with Standard providing for the accumulation of seniority (with attendant job security rights) by employees in the unit it represented on jobs within that unit. The provisions was a valid one.[4] We fail, therefore, to perceive how it may be held that CSPU violated the Act by merely demanding that Standard give effect to the seniority provisions of the contract.

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[4] Cf. *Local No. 6281, United Mine Workers of America*, 100 NLRB 392, 393, wherein the Board recognized that a union may strike to compel an employer to abide by contract provisions giving employees seniority rights.

We have, in reaching the conclusion that the layoffs did not violate the Act, considered the various reasons advanced by the Trial Examiner in support of his finding to the contrary. We find those reasons to be without merit. In the first place, we have, on the basis of the considera tions stated above, found that the 17 boilermakers who, after the severance election, were working in the operating and maintenance labor pool, neither had seniority status in, nor after the certification of Local 483, were members of, the o. and m. unit. We expressly reject the Trial Examiner's finding to the contrary. Secondly, and again with respect to seniority, the Trial Examiner indicated that the boilermakers had seniority status apart from any collective-bargaining agreement and that this seniority status was "acquired by grant" of Standard. The record offers no support for such a finding; but, to the contrary, establishes that such seniority rights as were possessed by an employee at any time arose out of contract between CSPU and Standard. We think it basic that seniority rights are not inherent in an employer-employee relationship.[5] The fact that boilermakers once enjoyed such rights under earlier contracts does not tend to establish that those rights continue after their contractual coverage was extinguished. Thirdly, respecting the unit status of the boilermakers, the Board did not, as indicated by the Trial Examiner, at any stage in the severance proceeding find that boilermakers would have a dual unit status, thus making them members of both an o. and m. unit and a boilermaker unit at the same time. Nor did the Board find, as suggested by the Trial Examiner, that "bumped back" boilermakers were eligible to vote in the severance election on a theory that they were "part-time" or "transient" employees. On the contrary, in its Decision (*Standard Oil Company*, 118 NLRB 1099), the Board recognized that during slack periods a boilermaker

[5] *Ford Motor Co.* v. *Huffman*, 345 U.S. 330; *Aeronautical Industrial District Lodge 727* v. *Campbell, et al.*, 337 U.S. 521, 526; *Cardenas* v. *Wilson & Co., Inc.*, 180 F. 2d 828 (C.A. 10).

might take an assignment to nonboilermaker work, but the Board specifically noted that such assignments were *temporary* and not such as would affect the status of boilermakers as true craftsmen. Thus, notwithstanding a boilermaker's temporary engagement in nonboilermaker work, he remained at all times and for all purposes a boilermaker.

We also reject the Trial Examiner's similar finding that the 17 boilermakers were in fact covered by the CSPI-Standard contract because they were engaged in o. and m. work. In this connection, we note that the contract specifically excluded all employees involved in the representation proceeding which was pending when the contract was signed. Moreover, the presence of boilermakers in the labor pool at the time of the certification of Local 483 was not by virtue of the contract, but solely by reason of the oral or "gentlemen's agreement" between CSPI and Standard to the effect that pending disposition of the representation case boilermakers would be treated as though they had the same rights which they had under the expired contract in respect to bumping back to the labor pool.

2. The Trial Examiner based his finding that Respondent violated the Act by its bid denials upon the same reasoning that underlay his finding with respect to the layoffs. For the reasons indicated, we also reject the reasoning in connection with the bid denials. Moreover, we think that the Trial Examiner erred in considering the issue of the legality of the bid denials by failing to give weight to the Board's *Midwest Piping* rule.[6] Under that rule an employer faced with rival representation claims must main

[6] *Midwest Piping and Supply Co., Inc.*, 63 NLRB 1060; reaffirmed in *Shea Chemical Corporation*, 121 NLRB 1027. In *Shea Chemical Corporation*, the Board specifically held "that upon presentation of a rival or conflicting claim which raises a real question concerning representation, an employer may not go so far as to bargain collectively *with the incumbent* (or any other) union unless and until the question concerning representation has been settled by the Board." [Emphasis supplied.]

tain a strictly neutral position, and must not bargain with an incumbent or any other union unless and until the question concerning representation has been settled by the Board. Thus, Standard, faced with a real claim by Local 483 to represent the boilermakers, could not have bargained with CSPU for these employees while Local 483's petition was pending before the Board. It follows that Standard and CSPU properly excluded the boilermakers from the coverage of their contract. Having thus been specifically excluded from the contract in accordance with a legal obligation, it would be inconsistent to assert that the boilermakers had rights (e. g., to bid into other departments) based on that contract.

3. There is another reason compelling the dismissal of the complaints. This is that there is missing here proof of an element essential to an 8 (b) (2) and 8 (a) (3) finding: intent to encourage or discourage membership in a labor organization.

Specific evidence of intent is, of course, not always essential to a showing of a violation. Thus, as the Supreme Court held in *Radio Officers'*,[7] where the employer's disparate treatment of its employees is based on union membership or lack thereof, the unlawful intent may be presumed. The governing principle in such cases as stated by the Court in that case is that "specific proof of intent is unnecessary where employer conduct inherently encourages or discourages union membership. . . ."[8] On the other hand, where the employer's conduct does not inherently so encourage or discourage union membership, it is clear that the presumption does not obtain and "the necessity for independent evidence of discriminatory motivation is *not* obviated."[9]

[7] *Radio Officers' Union of the Commercial Telegraphers Union, AFL (A. H. Bull Steamship Company)* v. *N.L.R.B.*, 347 U.S. 17.

[8] Ibid., at p. 45.

[9] *Anheuser-Busch, Inc.*, 112 NLRB 686, 690.

In the *Radio Officers'* case the Supreme Court did not have before it any issue respecting disparate treatment in a situation where, as in the instant case, the union was not the exclusive bargaining agent of all employees concerned. Indeed the Court expressly stated that it was not passing upon the legality of disparate treatment in such circumstances.[10] This limitation upon the scope of *Radio Officers'* was recognized by the Board in *Anheuser-Busch, Inc.*, 112 NLRB 686, and again in *Speidel Corporation*, 120 NLRB 733. In the latter case, the Board specifically held that where the union is not the exclusive bargaining agent of all the employees, the Board may not, without reference to the employer's actual motivation, properly infer discriminatory intent solely from the disparate conduct itself. The Board further held that in such circumstances, if it is to be inferred that the employer was discriminatorily motivated, this must be done on the basis of evidence other than the disparate treatment of its employees.

In the *Anheuser-Busch* case the employer had extended an economic benefit to the employees in one bargaining unit, represented by its own bargaining representative, without according the same treatment to the employees in another separate bargaining unit, represented by another bargaining representative. The Board held that "the statutory scheme did not contemplate that disparate treatment among employees in different separate units *along unit lines* would, by itself, give rise to a finding of discrimination." Rather, the Board said, the inference of unlawful motivation must be predicated on other independent evidence.

Applying these principles to the instant cases, it is clear that the facts do not warrant a finding that there was inherent in Standard's conduct an unlawful intent to encourage or discourage membership in any labor organization. While there was differentiation in treatment between the boilermakers and the o. and m. employees, this differentiation in treatment was not based on "membership" in a

[10] 347 U.S. 17, 47.

union. Rather, it is clear, the differentiation in treatment was based on membership in a unit. Nor is there here independent evidence showing that the Respondent's action was motivated by discriminatory intent. Thus there is nothing in the record tending to prove that Standard was motivated by any unlawful animus toward Local 483 or by any purpose other than its avowed purpose--i. e., to comply with what it considered the law required and with the terms of its bargaining agreement with CSPU.

For the foregoing reasons, we shall dismiss the complaints.

ORDER

It is Hereby Ordered that the complaints be, and they hereby are, dismissed.

Dated, Washington, D. C.

Intermediate Report and Recommended Order

STATEMENT OF THE CASE

This proceeding, with all parties represented, was heard before the undersigned Trial Examiner in St. Louis, Missouri, on November 18 through November 21, 1958, on consolidated complaints of the General Counsel and answers of Central States Petroleum Union, Local 115, herein called Local 115, CSPU, and the Respondent Union, and of Standard Oil Company, an Indiana corporation, herein variously called Standard, the Company, or the Respondent Company. The principal issue litigated was whether the Respondent Union had violated Section 8(b)(1)(A) and 8(b)(2) of the Act and whether the Respondent Company had violated Section 8(a)(2) and (3) and Section 8(a)(1). Briefs were received by the Trial Examiner from the General Counsel and both Respondents.

Upon the entire record and from my observation of the witnesses, I make the following:

FINDINGS AND CONCLUSIONS[1]

I. The business of the Company Respondent

Standard Oil Company, an Indiana corporation, has its principal office and place of business in Chicago, Illinois. It is engaged in the business of refining, transporting and marketing petroleum and petroleum products; among other things, it operates a refinery at Wood River, Illinois. Standard annually ships products valued in excess of $50,000 across State lines.

[1] The General Counsel and counsel for the Charging Parties filed motions to correct a number of minor inaccuracies in the transcript; no objections were made thereto. The motions are granted, the motion papers are hereby made part of the record, and the record is corrected accordingly.

The parties agree, and I find, that the Respondent Company is engaged in commerce within the meaning of the Act, and that it will effectuate the purposes of the Statute to exercise jurisdiction herein.

II. The labor organizations involved

Central States Petroleum Union, Local 115, and Local 483, International Brotherhood of Boilermakers, Iron Ship Builders, Black Smiths, Forgers and Helpers of America, AFL-CIO, are labor organizations within the meaning of Section 2 (3) of the Act.

III. The unfair labor practices

A. *Background:*

The events giving rise to this case arose in the Company's Woods River refinery, where for many years CSPU has been the bargaining agent for a comprehensive unit of operations and maintenance employees. There came a time in 1956 when the employees in the boilermaker department, a mechanical or maintenance division group, chose to be represented separately as a craft unit. Over repeated and vigorous protests by the Company and CSPU, the Board ruled such a unit to be appropriate, held the severance election requested by the boilermakers, and eventually in 1958 certified Local 483, International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers and Helpers of America, AFL-CIO, herein called Local 483, as bargaining agent for the boilermaker department.[2] In keeping with a complex plant-wide system of seniority in existence for over 20 years, a number of boilermakers were "temporarily" at work in departments which remained a part of the old operations and maintenance unit. In direct consequence of the boilermakers' decision to be separately

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[2] *Standard Oil Co.*, 118 NLRB 1099; Order Denying Motions, dated March 26, 1958, unpublished.

represented by Local 483 in the boilermaker department, and pursuant to a previously announced plan, CSPU, on threat of strike, caused the Company to lay off 17 boilermakers on April 17, 1958, when the Board certificate issued. The complaint alleges (1) that such layoffs constituted discrimination by the Company in violation of Section 8(a)(3) and 8(a)(1) of the statutes; (2) that they also constituted unlawful assistance to CSPU within the meaning of Section 8(a)(2); and (3) that CSPU violated Section 8(b)(2) and 8(b)(1)(A) in causing the Company to take such action.

B. *The pertinent facts:*

1. Testimony and exhibits

The General Counsel and the two Respondents stipulated upon a 60-page "agreed statement of facts," and offered it into evidence, in place of sworn testimony, together with 52 stipulated exhibits. Counsel for the Charging Parties refused to sign the stipulation and objected to admission of both the statement and the exhibits on the grounds that much of it is immaterial, and some of its contents inaccurate. The General Counsel, without specifying, agreed that many of the exhibits, and many of the "facts" so stated are irrelevant to the issue of this case, and explained that he proceeded in this manner because the exhibits did establish those facts which he believed necessary to support the complaint. He did not, either on the record or in his brief, single out which facts, or what "evidence," should be considered pertinent. The Charging Parties and the Respondents were permitted to and did introduce evidence pertinent to the complaint.[3]

Because of the manner in which the General Counsel chose to proceed, the record contains much evidence which is argumentative or immaterial in this proceeding, and which

[3] *Borg-Warner Corporation*, 113 NLRB 152, enfd. 231 F. 237 (C.A. 7).

in substance is only an attempt to relitigate and reargue the merits of the representation case issue decided by the Board in the earlier proceeding. The Board having finally decided, after full consideration of the arguments and facts, that a "boilermaker department" unit is appropriate for bargaining purposes in this refinery, I deem that question no longer open for consideration or litigation here. Accordingly, I will set out only those facts, as to which there is practically no dispute, which bear a relationship to the issue of this case: whether the two Respondents acted unlawfully in bringing about the discrimination in the employment of 17 employees named in the complaint.

2. The Company's method of operations

The bulk of the refinery's 1300 operation and maintenance employees work in 5 divisions: heavy oil, chemicals, utilities, and mechanical division. Of these only the mechanical division is divided into departments: carpenters, storehouse, tinners, insulators, masons, welders, pipe-gang, boilermakers, painters, riggers, electricians and transportation. In addition, there is a labor pool into which employees from the various divisions or departments are transferred from time to time, and from which they are reassigned to other departments or divisions as needed.

All employees, except any that may work in the labor pool, carry a divisional designation; those who work in the mechanical division also carry a departmental designation. In some of the departments regular apprenticeship programs are carried on; in consequence, employees in such departments are also classified journeymen or apprentices.

It is a normal incident of operations of this refinery that the workload, and the consequent need for workmen, keeps changing in each division and department. To adjust to this shifting need, employees are regularly transferred among divisions and departments. This transfer is accomplished by sending employees out of their regular desig-

nated divisions or departments into the labor pool, whence they are in turn assigned out into other groups as needed. The selection of particular employees in or out of the various groups—tranfer of unneeded boilermakers, for example, out of the boilermaker department; assignment of surplus employees out of the labor pool to groups in need of more workmen; or actual layoff of employees from the labor pool when the overall needs of all five divisions are below the total manpower available—is predetermined on the basis of a long established seniority system.

Every employee has plant seniority, which starts mounting from his first day of hire. As soon as he enters one of the divisions he begins to accumulate a second prerogative—divisional seniority. If he either simultaneously or later goes into a department, he acquires and keeps adding still a third—departmental seniority.[4] Employees who have only worked in the labor pool, or who choose to divest themselves by "bidding out" of any department or division, acquire no seniority except the ever-present plant seniority.

In accordance with these established seniority rights, excess employees "bump" out of a division, or a department, into the labor pool in inverse order to their divisional or departmental seniority. From there they are entitled to assignment out of the labor pool—back into their own department or division, or into other departments or divisions where needed,—in direct ratio with their acquired divisional, departmental, or plant seniority. And finally, in the event of layoff because of too many employees accumulated in the labor pool, those with the least plant seniority go home first, and are recalled when needed in reverse order.

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[4] The record indicates, with little clarification, there is also a fourth type: promotional group seniority. This concept is sometimes interchangeable with departmental seniority and sometimes distinguishable. Its precise nature is immaterial to the issue here involved.

This system of transfer and assignment is called bumping. In addition, the same seniority measurements govern the matter of "bidding" rights which all employees enjoy. Whenever a permanent opening is posted for any division or department, again all employees who desire to enter into such department or division bid, and the seniority accumulations of each fixes the successful bidder. When an employee so bids into another group, he loses all previously accumulated lesser seniorities, and starts over again in his new department or divisional seniority. Plant seniority never changes.

3. The status of the 17 employees and the discrimination against them

On April 17, 1958, 17 employees who carried boilermaker department seniority, and therefore also divisional and plant seniority, were working in the labor pool, or on temporary assignment in other departments or divisions.[5] They had bumped, on various dates, out of the boilermaker department for lack of boilermaker work.[6] Of the 17, 3 carried 13 years of boilermaker seniority, 1 over 12 years, four 10 years, one 9 years, and the others a lesser amount. One of them had been bumped out of the boilermaker department 31 months earlier, 2 of them 2 years before, 3 of them over 1½ years, and the rest for lesser periods. On that same day, April 17, there were other employees—not

[5] The hourly rate in the labor pool itself—on strictly laborer work—seems to be the lowest in the refinery. When employees are sent out of the labor pool to other departments of the division—i.e., other than the department in which they hold their own regular seniority status—they are paid the lowest rate for that department usually the helper rate. This hourly pay is higher than the common laborer rate and therefore assignments out of the labor pool are called premium jobs.

[6] At that time 33 employees carried "boilermaker" seniority, and therefore constituted the "boilermaker department"; the other 16 were at work on regular boilermaker duties in their department.

of the boilermaker department—in laid-off status because they had less plant seniority than the 17 boilermakers. On that critical date—April 17—the Company laid off the 17 boilermakers and recalled in their place 17 nonboilermaker workmen from laid-off status.

Five of the 17 boilermakers laid off were also denied the previously enjoyed seniority rights to bid into other departments of the plant while they were working in the labor pool. On November 25, 1957, E. C. Jones attempted to bid out of the boilermaker group into another promotional group of the five divisions constituting the general operating and maintenance unit. In February 1958, Schoeneweis, Best, Miller and Lankford attempted to bid into the transportation department of the mechanical division. All of these bids were denied by the Company. If the Company had continued to accord to Jones, Schoeneweis, Best and Lankford the seniority prerogatives previously enjoyed all four of these persons would have been granted the requested permanent transfer into the other departments because their respective relative seniority sufficed.[7]

4. The cause of the discrimination

This complex system of seniority classifications and accumulations by individual employees, and the consequent bumping, assignment, bidding and layoff rights and safeguards, have been spelled out in detail in the successive contracts which Standard has had with CSPU. Their 1955 contract expired on December 27, 1956. While they bargained towards a new agreement thereafter, there was no contract in effect until May 3, 1957, when a new one was signed effective until 1959. Because of the pending craft severance representation proceeding involving the boilermaker department, the 1957 contract expressly excluded

[7] As to Miller, the General Counsel stated on the record that his seniority rating was not sufficient to win the requested transfer in any event.

from its coverage any employees affected by that proceeding. The Company and CSPU agreed thereafter, however, by letter from Standard accepted by letter from CSPU, that boilermaker employees would enjoy "the same wage increases and other working condition changes" they would have received had they been covered by the new contract. With execution of the new agreement, the parties also agreed orally that until the representation case was finally decided by the Board, the boilermakers would continue to be accorded all previously enjoyed seniority privileges to bump in and out of the labor pool as in the past. They made no separate agreement respecting any bidding—or permanent transfer—out of the boilermaker department.

It is clear that CSPU caused Standard to lay off the 17 boilermakers on April 17, 1958, and to deny the bid requests of 5 of them shortly before that date. On September 12, 1957, a week before the boilermaker department election, CSPU advised each of the boilermakers by individual letter that they would no longer be permitted to perform any work pursuant to seniority outside the boilermaker department if they voted for Local 483. CSPU also informed Standard of this position repeatedly throughout the representation proceeding, and on April 10, 1958, when issuance of the Board's April 16 certification in favor of Local 483 appeared a certainty, it wrote to the Company, saying that if the 17 employees from the boilermaker department then working in or out of the labor pool were not laid off and replaced with employees of the Operation and Maintenance Unit, "CSPU 115 would shut down the entire refinery by strike action."

As to the denial of the bids for permanent transfer by certain boilermakers, CSPU wrote the Company first on November 1, 1957, "vigorously opposing" Jones' initial bid for transfer, with the statement it "would feel free to use any . . . economic action . . ." if the bid were granted. Moreover, both Respondents admit, in the "agreed state-

ment of facts," that "Standard denied the aforesaid bid by Jones, Schoeneweis, Best, Miller and Lankford because of CSPU 115's insistence. . . ."

C. *Analysis and conclusion*

The General Counsel carefully limited his arguments to the precise scope of the issue raised by the complaint as worded. He contends no more than that deprivation of work and bidding rights to the employees named in the complaint was a discrimination against them within the intendment of Section 8(a)(3) of the Act, and that the Respondent Union's conduct in causing such discrimination was also unlawful. The Respondents insist that this proceeding also requires resolution of many more questions that, they assert, inferentially are raised by the specific complaint allegations. They call for exact pronouncements as to (1) the areas of bargaining authority in CSPU and Local 483; (2) the legal effect of future contracts which Standard might execute with these Unions; (3) and the legality of a diversity of later actions which Standard might choose to take in the regular operation of the refinery when two instead of a single union represent its employees in separate bargaining units. Asked on the record to take a firm position on these legal questions, counsel for the General Counsel refused. As a result, none of them were litigated at all. Indeed, the General Counsel also opposed the Charging Parties' attempt to enlarge the unfair labor practice allegations of the complaint.[8]

I fully appreciate, as the Respondents have repeatedly hinted throughout this and the earlier representation proceeding, that the ultimate decision in this case may inexorably lead to, indeed logically compel, further significant rulings as to the meaning of other sections of the Statute.

[8] The Trial Examiner sustained the General Counsel's objection to an offer of proof intended to show independent violations of Section 8(a)(1) by the Respondent Company.

Some of the questions which the Respondents seek to explore touch upon the fundamental nature of the collective bargaining process and of union contracts made on behalf of employees. I shall nevertheless limit my consideration of this case to the issues expressly calling for resolution by the complaint and answers. It is beyond the regular function of a trial examiner in these proceedings to pass judgment on questions not put in issue by the pleadings, on hypothetical problems, or on important matters not litigated by the parties. Declaratory judgments, or advisory opinions, are best left for the Board itself to enunciate, when it sees fit, as the body primarily responsible for interpretation of the Statute as a whole.

The facts of this case literally spell out a violation of the Statute by both Respondents. The 17 men named in the complaint were at work on April 17. CSPU wanted them removed from the work they were doing; it threatened to strike if the Company did not oblige. The Company yielded and laid them off. CSPU did this because the boilermakers as a group—including the 17—had voted for Local 483 in the severance election. Without question, had the boilermakers not voted for Local 483, CSPU would not have caused their layoff. No matter how varied or ingenious the descriptive words that may be used by the Respondents to explain their actions, nothing can alter these basic facts. No plainer violation of Section 8(a)(3) and 8(b)(2) can be stated.[9]

[9] In pertinent part, Section 8(b)(2) reads:

> It shall be an unfair labor practice for a labor organization or its agents . . . to cause or attempt to cause an employer to discriminate against an employee in violation of subsection (a)(3). . . .

In pertinent part, Section 8(a)(3) reads:

> It shall be an unfair labor practice for an employer . . . by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization.

The Respondents' defense is phrased in ambiguous and confusing words, and I do not clearly understand it. The sum total of its variously worded arguments, however, seems to be that all this necessarily flowed, or was the legal consequence of the Board's determination that the boilermakers at work in the labor pool at the time of the certification were eligible to vote in the "boilermaker department" election. From this fact it follows—they argue—that the 17 employees removed themselves from the coverage of the CSPU contract, or from any right to be represented by CSPU, and surrendered any seniority right to perform any work outside the boilermaker department. The Respondents add to these contentions the unequivocal assertion that seniority rights stem only from a collective bargaining contract; that no such employment rights exist absent such an agreement. *Ergo*, the defense concludes, the boilermakers having relinquished any rights to employment in the labor pool, they have nothing the Respondents could take away from them and there was no discrimination at all.

As the foregoing rationale proceeds, it falls into successive errors, any one of which is fatal to the entire line of reasoning.

To start with, the very use of the word "right," in speaking of the boilermakers' employment in the labor pool and the Respondents' conduct in depriving them of their earnings there, is used by the Respondents in misconception of the issue of this case. We are not concerned here with any "right" of employees to employment, in the sense that such a right might or might not be enforcible against an employer in a court of law. Such a right might arise from an employer's oral promise to give certain benefits to his employees in return for their work; it might rest upon a written individual employment contract with him; or it might be spelled out in detail in a collective bargaining agreement with the union as the agent of the employees. A better word for such employment rights might be

"claims" against an employer for failure to fulfill his obligation—whether set out by contract or made orally. But enforcement of such "rights," or "claims," are purely contractual matters, express or implied, that are irrelevant to the concern of this Statute. If an employer breaches his contract of employment, whether with the individual or through his union, he does not thereby commit an unfair labor practice. The only "right" with which this Statute is concerned, and therefore the only "right" that can be said to be involved in this case, is the "right to self organization . . . [or] to refrain . . . from . . . such activities."[10] This statutory right ought not be confused with, and is not equatable to, any right to work. In administering the Statute, the Board, through proceedings like this, protects this right of employees, and through the Appellate Court, enforces such rights. It does not concern itself with any claims employees may assert against employers for failure to live up to promises to accord privileges in return for work performed. Therefore, whether the 17 boilermakers had a "contractual right" to continue working in the labor pool, or whether that right to employment existed as a just claim of theirs against Standard apart from the contract, has nothing to do with this case. That right is not guaranteed in the Statute.

In implementation of the Section 7 right to engage in union activities, Section 8(a)(3) and 8(b)(2) impose pro-

[10] Section 7 of the Act reads:

> Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8(a)(3).

scriptions upon employers and unions prohibiting them from engaging in certain conduct which impinges upon that statutory right of the employees. These sections make it unlawful to discriminate against employees in their "tenure of employment or any term or condition of employment." It is not deprivation of work, in itself, that is prohibited, but any such deprivation as results, or is related to union activity.[11] Because in these sections it is a hurt to the person's employment that is outlawed, Board and court cases say they give employees a "right to work" free from unlawful discrimination. However, descriptive language in decided cases do not create rights in themselves. Such language does no more than restate the basic statutory right to form unions and to do so freely, without unlawful interference through work curtailment. If Standard in this case had deviated from the established seniority practice for economic reasons—because, for example, the type of work being performed in the labor pool and other departments had changed and the skill of the boilermakers was inadequate—the layoffs might have been in violation of the CSPU contract, or of an implied promise to the boilermakers, but they would not have constituted unfair labor practices under the statutory prohibitions underlying this case. Redress for layoffs in such a case would not rest with the Board, but with the regular courts of law. No economic justification is urged in this case. Admittedly, the discrimination, the layoff and the departure from the established seniority system, were imposed upon the boilermakers because of the way they had voted in the election.

Elsewhere in their briefs the Respondents rephrase their main argument by saying that apart from a collective bargaining contract an employee can not consider seniority, with its usual attendant preferences against layoffs, as a

[11] *The Radio Officers' Union of the Commercial Telegraphers Union, AFL v. A. H. Bull Steamship Company* v. *N.L.R.B.*, 347 U.S. 17.

condition of his employment.[12] The reported decisions on which they rely support only one-half of their broad statement. The courts have indicated that seniority rights are not inherent characteristics of employment as such.[13] This does not mean to say, however, that when an employer sees fit, for business or moral reasons sufficient to itself, to grant and make seniority prerogatives a condition of employment or an element of compensation for faithful work performed, the resultant seniority rights relate any the less to "tenure of employment" as the phrase is used in Section 8(a)(3) of the Act. No case need be cited for the proposition that an employer violates Section 8(a)(3) when, contrary to his past seniority practices, he lays off an employee out of term because of his union activities; and most of the decisions in which the Board found such unfair labor practices were situations where there had been no union in the picture at all. Indeed, a seniority status, acquired by grant of an employer by virtue of long employment, is literally a "tenure of employment" and therefore an area in which the Statute prohibits discrimination by an employer. Compare: *Pacific Intermountain Express Co.*, 107 NLRB 837. The fact of discrimination against the 17 boilermakers is the clearest matter established by this record.

Still another contention is made in defense, one which is phrased in different words but which I view as another attempt to urge the same basic argument discussed above.

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[12] Thus, CSPU's attorney stated at oral argument: "in the absence of seniority provisions the employee has no job rights whatever."

[13] *Trailmobile Co.* v. *Whirls*, 331 U.S. 40; *Ryan* v. *New York Central Railroad*, 267 Michigan 202; *Garigan's Bookbinders Union*, Pa. Sup. Ct., 43 LRRM 2348. These cases, and others cited by the Respondents (*Ford Motor Co.* v. *Huffman*, 345 U.S. 330; *Aeronautical Industrial District Lodge 727* v. *Campbell, et al.*, 337 U.S. 521), relate to other statutes. They are all inapposite here for the further reason that none involved collective bargaining agreements which attempted to discriminate against particular employees *embraced within the bargaining unit* on the basis of their union activities. [Cf: *Gaynor News Co., Inc.* v. *N.L.R.B.*, 347 U.S. 17.

The Respondents advance the theory that when the boilermakers voted for Local 483, or when the Board held all boilermakers—including the 17—eligible to vote for that union, all of these employees could only thereafter be represented by Local 483, could not be covered by the CSPU contract, and could not legally look to CSPU's assistance in continuing to enjoy their employment tenure—or seniority prerogatives—in the operating and maintenance unit. Precisely by what reasoning these blanket statements not supported by any decisional authority or express statutory language—serve to excuse the otherwise clearly unlawful acts committed by the Respondents, is nowhere explained.

The Respondents appear to misconceive the purport of the Board's unit determination in a representation case. The Board does not include in the bargaining unit particular individual employees, but joins instead particular jobs. The common denominator which serves to unite a group for bargaining purposes—called community of interest by the Board—is found in the various aspects of the work which job classifications or descriptions call for. The unit is not determined by common characteristics found in the individual employees who chance, at any given moment, to occupy these jobs. Where, for example, the Board examines among other things the skill or perhaps journeyman status which the employees possess, it does so only because in this manner is revealed the skills required to do the work in the *jobs* involved. And again, it is the job which is of concern in the unit arrangement; not the named individuals at work.[14]

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[14] *H. P. Wasson and Co.*, 105 NLRB 373: "... the Board's unit delineations are based on *functionally* related work categories, and all employees performing like work are necessarily included in the unit regardless of their tenure of employment." See, also, Sixteenth Annual Report of the National Labor Relations Board, page 120: "Our unit finding is based upon functionally related occupational categories, and all employees working at jobs within the unit are necessarily included and *entitled to representation*, irrespective of the tenure of their employment." [Emphasis supplied]

It is for this reason that a union selected by the majority of employees at work on election day remains the bargaining agent of employees who enter the unit in normal turnover later. Indeed, the same single job can be held successively by any number of employees over a given period and the union always bargaining for the job, regardless of change in incumbent. Similarly, the Board holds elections even knowing of anticipated expansions of the employee complement in the unit. The reason here is because the jobs which additional employees will hold are of the same kind as those included in the unit found appropriate. Restated: the jobs are included—not the individual employees.

Pursuant to these basic principles of Board law in the field of representation cases, on April 16, 1958, when the Board certified Local 483 as the bargaining agent for the "boilermaker department," it meant that thereafter that union would bargain with the Company concerning "rates of pay, wages, hours of employment and other conditions of employment" applicable to work, or jobs in the boilermaker department. By like reasoning, CSPU remained the bargaining representative for all jobs still falling in the existing operations and maintenance unit, including all labor pool jobs and all premium jobs in areas outside the boilermaker department. And as the 17 boilermakers at issue were then working in jobs for which CSPU was bargaining agent, they were, to the extent that they had a vested employment in those jobs, entitled to be represented by CSPU.

Nor is the foregoing fundamental principle inconsistent with the fact that a union represents employees. It speaks to the employer on behalf of the individual workmen who occupy the jobs inside the unit at the time of negotiations. As collective bargaining essentially concerns itself with the employee-employer relationship—or the conditions of employment—necessarily the union becomes the spokesman of

employees. But while the unit must have a stability in terms of job or departmental setup, it need not be and rarely is static in terms of employee complement. And so the selection of the union—what the Board calls resolution of the question concerning representation—must also be determined by reference to the existing complement of employees at a given moment. Eligibility therefor merely means—as the standard Board formula reads—that a person in fact occupies an included job at that time, or works in it with sufficient frequency or for sufficient periods of time to have enough interest in the question of whether or not bargaining for that job should be collective or by individuals.

A regular part-time employee votes—and is said, loosely, to be included in the unit—even though he spends the major portion of his time working elsewhere.[15] Another person, who occupies one of the individual jobs only sporadically or casually, does not vote.[16] But both the casual and part time worker, like the regular full-time man, are included in the unit in the sense that when they do find themselves occupying an included job, they are represented by the union for such employment within the unit.

And, finally, the Board has expressly applied these same principles to those instances, like the situation here presented, where the part time, or transient employee—so to speak—spends all of his time with a single employer although part of such time is in the bargaining unit in question.[17] That all this adds up to a conclusion that the 17 boilermakers were properly included in both the boilermaker department unit of Local 483, and in the operations and maintenance unit of CSPU, is conclusively shown by direct analogy to the Board's decision in *Kennecott Copper Cor-*

[15] *Evening News Publishing Co.*, 93 NLRB 1355.

[16] *F. B. Silverwood*, a corporation d/b/a *Silverwood's*, 92 NLRB 1111.

[17] *The Ocala Star Banner*, 97 NLRB 384.

poration, 106 NLRB 390, where the Board held a named employee eligible to vote in each of two severance craft voting groups.[18]

A last contention of the Respondent is that the 17 boilermakers had been excluded from the current CSPU contract, and that because this was done pursuant to Board law, there were no seniority privileges remaining to them.[19] This argument is wedded to the same fallacy underlying the earlier contentions. It is not directly named individuals, personally identifiable at a given moment, who are covered by a collective bargaining agreement, but jobs, or employee classifications. What the parties excluded therefore from their contract coverage was boilermaker work, or jobs, and, in consequence, all employees engaged in such work. They did not, and could not, exclude the labor pool jobs, or the premium jobs then held by the 17 employees named in the complaint. And with the jobs always go the people who are at work.

In any event, however phrased—as an exclusion of 17 employees from the CSPU contract coverage, as a disparate

[18] To the same effect, *Hunt-Van Buren Co.*, 122 NLRB No. 111, where a temporary guard was permitted to vote in the production and maintenance unit. The Board said "... Akin, so long as he performs any guard duties, will not be in the production and maintenance unit and, during that period the Petitioner, if certified as a result of this election, may not bargain for him. It is only at such time as he is relieved of his guard duties and returns to his regular job within the unit that the Petitioner, if certified, may represent his interest."

[19] In accordance with the rule of *Midwest Piping*, 63 NLRB 1069, reaffirmed recently in *Shea Chemical Corp.*, 121 NLRB No. 1027. Standard and CSPU suspended their practice of bargaining for boilermakers during the pendency of the craft severance representation proceeding. Therefore, the recognition clause of their 1957 contract, in effect when the 17 were laid off, reads "... exclusive of all employees involved in the representation cases Nos. 14-RC-3118 [Boilermakers] and 14-RC-3120 pending before the National Labor Relations Board."

treatment of a class of employees included in the bid" represented by CSPU, or at a lesser denial of employment. It is clear that CSPU caused the Company to remove the 17 employees from their jobs solely because they had elected to be represented by Local 18 in their boilermaker work assignments instead of by CSPU. This was a discrimination against them in their "terms of employment" which the Statute forbids.

All of the foregoing reasoning applies equally to the Respondents' rejection of bids by four of these employees (Jones, Schoeneweis, Best and Landforce) for permanent transfer into departments other than boilermaker.[2] In November 1957 and February 1958, when they bid for job openings posted by the Company, they were at work on jobs included in the operation and maintenance unit represented by CSPU. It was an incident of their employment—a benefit accorded by the Company, and codified in the CSPU contract which related to their labor pool jobs,[3] that they were compensated in part by the privileges of bidding into other jobs inside the bargain

[2] It was not shown that Miller had sufficient seniority in February 1958 to be entitled to the transfer he bid for, and the General Counsel conceded he had too little. I therefore find no support for the complaint allegation that denial of Miller's request was an unfair labor practice.

The complaint also alleges the commission of a separate unfair labor practice in the denial of E. C. Jones' request, in November 1957, to be transferred out of the boilermaker department into the labor pool, which is not a department or promotional group at all. There is no proof in the record that such mere relinquishment of seniority or departmental classification was provided for in the established system, or that the Company had ever accorded such privilege to its employees. Asked by the Trial Examiner at the hearing to explicate his theory of the complaint at this point, the General Counsel deferred a reply for his brief, the brief does not touch upon it. I find this allegation of the complaint also unsupported by the proof.

[3] *J. I. Case v. N.L.R.B.*, 321 U.S. 332.

ing unit, in addition to the relative protection against layoff assured by their plant seniority. All the employees were aware of CSPU's announced intention to force the Company to lay off a number of labor pool employees carrying boilermaker seniority, and it may well be that these four were seeking only to avoid the economic hurt which eventually hit them. The material value of particular benefits received in return for employment are not for me to assess. It suffices, for purposes of resolving the issue raised in the complaint, that these employees had long enjoyed such bidding or transfer privileges in their employment, that such established benefits were taken from them, and that the reason was one proscribed by the statute.

On the issue raised by these rejected bids, I cannot escape the conclusion which logically flows from the reasoning and decisions discussed above. In effect, the Respondents urge a contrary conclusion because, in their view, by like reasoning the Board would be compelled to rule that boilermakers who never previously had been assigned out of boilermaker work could also bid out of their department to permanent positions in the operations and maintenance unit, and to displace employees with greater seniority there. And they may be correct. Indeed, the record also shows that "boilermakers," while working in a labor pool, retain the established right to do a proportionate share of any overtime work that may be needed from time to time in the boilermaker department. The Respondents ask whether their past practice must continue despite the change in the collective bargaining situation now with two separate units in place of the old single one. These last questions, and others of like kind, are not in issue in this case and need not be answered by me. The Board has recognized that the entire principle of craft severance gives rise to problems; it did not deem that fact sufficient to deny elections in such

cases.[22] It is to be expected that in some cases the resulting problems will be few and minor and in others they may be multiple and aggravated. The wisdom of the Board's rulings, and of its case to case application of overriding basic principles, are not for me to criticize.

Accordingly, in view of the foregoing, I find that by causing Standard Oil Company to lay off the employees named in the complaint, and in causing the Company to reject the bids of four of them for permanent transfer, the Respondent Union violated Section 8 (b) (2) and 8 (b) (1) (a) of the Act, and that by so laying off those employees and denying transfers to four of them, the Respondent Company violated Section 8 (a) (1), (2) and (3) thereof.

IV. The effect of the unfair labor practices upon commerce

The activities of the Respondents set forth in Section III above, occurring in connection with the operations of the Company set forth in Section I above, have a close, intimate and substantial relation to trade, traffic and commerce among the several States, and tend to lead to labor disputes burdening commerce and the free flow of commerce.

The Remedy

Having found that the Respondents have engaged in certain unfair labor practices, I will recommend that

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[22] See *American Potash & Chemical Corp.*, 107 NLRB 1418, 1422:

> . . . we have given grave consideration to the argument of employer and union groups that fragmentation of bargaining units in highly integrated industries which are characteristic of our modern industrial system can result in loss of maximum efficiency and sometimes afford an opportunity for jurisdictional disputes as to work assignments. We are cognizant of the disruptive economic and social conditions that can and sometimes do occur as the result of craft existence in industrial plants.

they cease and desist therefrom and take certain affirmative action designed to effectuate the policies of the Act.

I will recommend that the Respondent Union cease and desist from causing or attempting to cause Standard Oil Company to lay off or to deny employment or transfer to its employees because they choose to be represented, in any aspect of their work, by a union other than the Respondent Union.

I will also recommend that the Respondent Company cease and desist from laying off its employees, or otherwise discriminating against them in their employment because they choose to be represented, in any aspect of their work, by a union other than the Respondent Union.

I will also recommend that the Respondent Company be ordered to offer to the employees listed in Appendix A attached hereto immediate and full reinstatement to their former or substantially equivalent positions, without prejudice to their seniority or other rights or privileges.

I will further recommend that the Respondents jointly and severally make whole the employees listed on Appendix A for any loss of pay they may have suffered by reason of the discrimination against them, by payment of a sum of money equal to the amount they normally would have earned as wages from the date of their layoff to the date of the offer of reinstatement, less their net earnings during said period, with back pay computed on a quarterly basis in the manner established by the Board in *F. W. Woolworth*, 90 NLRB 289, 291-294. I will also recommend that the Respondent Company make available to the Board upon request, payroll and other records to facilitate the determination of the amounts due under this recommended remedy. Respondent Union shall not be liable for back pay accruing 5 days after it shall have notified the Respondent Company in writing that all objections to the employment with full seniority rights of these employees have been

withdrawn and that it formally requests their reinstatement.

In view of the nature of the unfair labor practices committed the commission of similar and other unfair labor practices reasonably may be anticipated. I shall therefore recommend that the Respondents be ordered to cease and desist from in any manner infringing upon the right guaranteed to employees under the provisions of the Act and from further discrimination against employees.

Upon the basis of the foregoing findings of fact and upon the entire record of the case I make the following:

Conclusions of Law

1. Central States Petroleum Union, Local 115, is a labor organization within the meaning of Section 2 (5) of the Act.

2. Standard Oil Company, an Indiana Corporation is an employer within the meaning of Section 2(2) of the Act.

3. By causing the Company to discriminate against the employees named on Appendix A attached hereto, in violation of Section 8(a) (3) of the Act, Respondent Union has engaged in unfair labor practices within the meaning of Section 8 (b) (2) of the Act, and has restrained and coerced those employees in the exercise of their rights guaranteed in Section 7 of the Act and has thereby engaged in unfair labor practices within the meaning of Section 8 (f) (1) (A) of the Act.

4. By laying off the employees named on Appendix A on April 17, 1958, and by denying transfers to some of its employees, at the request of the Respondent Union, the Respondent Company has encouraged membership in the Respondent Union in violation of Section 8 (a) (2) of the Act, and has discriminated against them in violation of Section 8 (a) (3) thereof.

3. By such discrimination, Respondent Company had interfered with, restrained and coerced its employees in the exercise of rights guaranteed in Section 7 of the Act, and has thereby engaged in unfair labor practices violative of Section 8 (a) (1) of the Act.

The aforesaid unfair labor practices affect commerce within the meaning of Section 2 (6) and (7) of the Act.

RECOMMENDATIONS

On the basis of the foregoing findings of fact and conclusions of law, I recommend that:

1. Central States Petroleum Union, Local 115, its officers, agents, representatives, successors and assigns, shall:

1. Cease and desist from:

(a) Causing or attempting to cause Standard Oil Company, or any other employer to lay off employees or in any other manner discriminate against employees, in violation of Section 8 (a) (3) of the Act;

(b) In any other manner restraining or coercing employees in the exercise of the rights guaranteed in Section 7 of the Act, including the right to refrain from engaging in any or all the activities guaranteed thereunder, except to the extent that such rights may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized by Section 8 (a) (3) of the Act.

2. Take the following affirmative action which I find will effectuate the policies of the Act:

(a) Notify the Company in writing that it withdraws all objections to the employment of the employees listed on Appendix A and to their assignment or transfer to jobs in accordance with previously enjoyed seniority rights, and that it requests the Company to offer them immediate and full reinstatement to their former or substantially equivalent positions:

(b) Jointly and severally with the Company make whole the employees listed on Appendix A for any loss of pay they may have suffered by reason of the discrimination against them, in the manner set forth in Section entitled, The Remedy;

(c) Post at the business office of Respondent Union and at all places where notices to stewards and members are customarily posted, copies of the notice attached hereto as Appendix B. Copies of this notice will be furnished by the Regional Director for the Fourteenth Region, and after being duly signed by Respondent Union shall be posted by it immediately on receipt thereof, and be maintained for sixty (60) consecutive days thereafter. Reasonable steps shall be taken by said Respondent to insure that such notices are not altered, defaced, or covered by any other material;

(d) Mail to the Regional Director for the Fourteenth Region signed copies of Appendix B, for posting, Respondent Company willing, at the latter's place of business in places where notices to employees are customarily posted;

(e) Notify the Regional Director for the Fourteenth Region, in writing, within twenty (20) days from the date of the receipt of this Intermediate Report and Recommended Order what steps have been taken by said Respondent in compliance therewith.

II. Standard Oil Company, its agents, successors and assigns, shall:

(1) Cease and desist from:

(a) Encouraging membership in or assigning Central States Petroleum Union, Local 115, or any other labor organization of its employees, by laying off employees because they choose to be represented, in any aspect of their work, by a union other than said Local 115, or by discriminating in any other manner in regard to hire or tenure of employ

ment or any term or condition thereof, except as authorized by Section 8 (a) (3) of the Act;

(b) In any other manner interfering with, restraining, or coercing employees in the existence of the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in concerted activities for the purpose of collective bargaining or other mutual aid or protection, or to refrain from any or all of such activities, except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment, as authorized in Section 8 (a) (3) of the Act.

(2) Take the following affirmative action which I find will effectuate the policies of the Act:

(a) Offer to the employees listed on Appendix A immediate and full reinstatement to their former or substantially equivalent position without prejudice to seniority or other rights and privileges in the manner set forth in the section above entitled "They remedy";

(b) Jointly and severally with Central States Petroleum Union, Local 115, make whole the employees listed on Appendix A for any loss of pay they may have suffered by reason of the discrimination against them, in the manner set forth in the section of this Intermediate Report entitled "The remedy";

(c) Preserve and make available to the Board or its agents, upon request, for examination and copying all payroll records, social security payment records, timecards, personnel records or reports, and all other records necessary to determine the amount of back pay due under the terms of these recommendations;

(d) Post at its place of business at Wood River, Illinois, copies of the notice attached hereto and marked Appendix C. Copies of said notice, to be furnished by the Regional

Director for the Fourteenth Region, shall, after being duly signed by Respondent Company be posted by it immediately upon receipt thereof and maintained for at least sixty (60) consecutive days thereafter in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent Company to insure that said notices are not altered, defaced, or covered by any other material;

(c) Notify the Regional Director for the Fourteenth Region, in writing, within twenty (20) days from the date of receipt of this Intermediate Report and Recommended Order what steps it has taken to comply herewith.

It is further recommended that unless the respective Respondents shall, within twenty (20) days from the receipt of this Intermediate Report and Recommended Order, notify said Regional Director, in writing, that they will comply with the foregoing recommendations, the National Labor Relations Board issue an order requiring them, or any of them, as the case may be, to take the aforesaid action.

Dated at Washington, D. C., this 3rd day of March 1959.

/s/ THOMAS A. RICCI
Thomas A. Ricci
Trial Examiner

APPENDIX A

KENNETH BEST
GEORGE A. CLAYTON
VICTOR COUCH
J. D. EVANS
FLOYD FRIEDLINE
SAMUEL R. GUARINO
MARION HOOPER
E. C. JONES
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J. A. LANKFORD
JACK LAVITE
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RALPH RAMSIER
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In the Supreme Court of the United States

OCTOBER TERM, 1961

No. 240

LOCAL 483, INTERNATIONAL BROTHERHOOD OF BOILERMAKERS, IRON SHIP BUILDERS, BLACKSMITHS, FORGERS & HELPERS OF AMERICA, AFL–CIO, ET AL., PETITIONERS

v.

NATIONAL LABOR RELATIONS BOARD

AND

STANDARD OIL COMPANY AND CENTRAL STATES PETROLEUM UNION, LOCAL 115, INTERVENORS

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. A1–4) is reported at 288 F. 2d 166. The decision and order of the National Labor Relations Board (Pet. A6–16) are reported at 127 NLRB 223.

JURISDICTION

The court of appeals entered its judgment on March 2, 1961, and denied a petition for rehearing on March

22, 1961 (Pet. A4–5). On June 1, 1961, Mr. Chief Justice Warren entered an order extending to July 20, 1961, the time for filing a petition for certiorari. The petition for certiorari was filed on July 20, 1961. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether Sections 8(a)(3) and 8(b)(2) of the National Labor Relations Act were violated by the denial to craft employees, who had been severed into a separate craft unit as the result of an NLRB representation proceeding, of job opportunities within an operation and maintenance unit to which their seniority had entitled them prior to their severance therefrom.

STATUTE INVOLVED

The relevant provisions of the National Labor Relations Act, as amended, appear at SA1–2 of the Petition.

STATEMENT

A. THE FACTS

1. *Introduction*

For many years prior to the events in this case, Central States Petroleum Union, Local 115 (herein called CSPU), had been the collective bargaining agent for a unit of operation and maintenance (O & M) employees at the Wood River, Illinois refinery of the Standard Oil Company (R. 7, 16–17; 47, 48).[1]

[1] "R" refers to the Joint Appendix filed in the court of appeals.

This unit consists of five divisions, one of which—the mechanical division—is subdivided into various departments including a department of boilermakers (R. 19; 47–48).

The workloads in the various departments and divisions fluctuate greatly, with the result that the number of employees permanently assigned to a particular work unit seldom coincides with the exact number of men needed at any one time (R. 19–20; 49). The problem of temporarily shifting employees from the departments and divisions where work is slack to those where work is available was resolved by agreement of the Company and CSPU upon a system of seniority and transfer rights. The agreement requires that, when a reduction of work occurs, the employees with the least seniority in the department or division affected shall be temporarily discontinued from the jobs they have been occupying. These employees, however, are not laid off, but are instead transferred to a labor pool which in turn furnishes such employees to other divisions or departments as needed. The right to reassignment out of the labor pool is governed by "plant seniority"—that is, the total time worked in the plant without reference to seniority in any particular department or division. Similarly, when a shortage of work within the plant results in an excess of employees within the labor pool, layoffs are made in inverse order of plant seniority (R. 8, 19–21; 49–52).

"Bumping" into the labor pool, and the consequential temporary assignments into other divisions or departments, does not interrupt the accumulation of

seniority within the work unit to which an employee is regularly assigned. Each employee who has been bumped back into the labor pool is entitled, under the agreement, to return to his own department (or division) when an opening develops, in accordance with his departmental seniority. During the period that an employee is working outside his own department or division he does not acquire departmental seniority in the unit where he is temporarily assigned, and he continues to exercise seniority rights within his own unit for such purposes as overtime work and vacation schedules. The agreement does not permit seniority other than plant seniority within the labor pool, which, as indicated, functions primarily as a clearing center for reassignment (R. 8, 19–23; 50–53).

A second facet of the seniority system is the right of employees under the contract to bid for permanent jobs outside their own regular work unit. Thus, if a permanent opening occurs, employees elsewhere in the O & M unit are entitled to bid for it, and departmental, divisional and plant seniority govern the selection of the successful bidder. Upon being transferred to the new department or division, the employee loses his seniority in his former work unit and is placed at the bottom of the seniority list at his new post, but his plant seniority remains unaffected (R. 8, 19–21; 55).

2. *The representation proceeding*

In October 1956, Local 483 of the Boilermakers filed with the Board a petition under Section 9(c) of the Act requesting that the employees in the Com-

pany's boilermaker department be given the opportunity to select it as their bargaining representative in a separate bargaining unit (R. 7, 17; 53, 118). On August 20, 1957, following hearing, the Board found that the boilermaker employees constituted a true craft group and were thus entitled to bargain separately from the O & M unit of which they had been a part, and directed an election to determine their wishes (R. 9; 118–126). In reaching its decision, the Board took into consideration the fact that boilermakers were bumped back to the labor pool when reductions of work occurred, but, finding that assignments from the labor pool were "temporary in nature, and are not considered a part of their routine duties," the Board concluded that this circumstance was not "a sufficient basis for denying craft severance to an otherwise true craft group" (R. 12; 122).

The election was held on September 19, 1957 (R. 9; 75). At that time 39 employees were carried on the seniority list of the boilermaker department, 22 of whom were currently working in the department and 17 of whom had been bumped back into the labor pool and were working at temporary jobs elsewhere in the plant (R. 9; 75–76; 126–127). All those working in the boilermaker department voted, casting 19 ballots for separate representation by Local 483 and 3 ballots for continued representation within the O & M unit by CSPU (R. 9; 126–127). Sixteen of the 17 employees who had been bumped back into the labor pool voted, but all of their ballots were challenged by the Company on the ground that, by virtue

of their temporary assignments, they were not in the boilermaker's unit (R. 9; 127). Both Local 483 and CSPU urged that these 16 ballots be counted (R. 129–131).

On November 6, 1957, the Board's Regional Director issued his report recommending that the challenged ballots be counted on the ground that the Board's direction of election contemplated that the craft unit include "all employees on the boilermaker seniority list" (R. 134). On April 2, 1958, the Board adopted the recommendations of the Regional Director and directed that the challenged ballots be opened (R. 10; 99). The final tally showed that 35 votes favored separate representation by Local 483, and 3 votes were cast for continued representation by CSPU with the existing O & M unit (R. 10; 144–145). On April 16, 1958, the Board certified Local 483 as the representative of the boilermaker employees (R. 10; 142–143).

3. *The refusal to apply the seniority provisions of the contract in the O & M unit to employees in the boilermaker unit*

Local 483's petition of October 1956, for a craft severance election was filed at a time when the Company and CSPU were beginning negotiations for a new contract to replace their existing agreement, which was to expire on December 27, 1956 (R. 7; 22). The pending question of craft severance raised by Local 483's petition became a matter of immediate and continuing concern to the Company and CSPU, both with respect to the treatment to be accorded the boilermaker employees in the pending contract negoti-

ations, and the application to them of the seniority arrangements in effect within the O & M unit. On November 12, 1956, the Company notified CSPU that in order "to maintain a position of neutrality" as to the craft severance question it was "immediately suspending all bargaining with [CSPU] on new working agreement provisions and wages affecting the [boilermaker] employees * * *." The Company added that it would continue to recognize CSPU for purposes of administering the existing contract with respect to the boilermaker employees, but would withdraw recognition as to such employees after the expiration of the agreement until the question of representation had been settled in the Board proceeding (R. 7; 58).

On May 3, 1957, the Company and CSPU executed a new collective bargaining contract covering the employees in the O & M unit, but specifically excluding the employees involved in the craft severance proceeding then pending before the Board (R. 7–8; 60). The new contract continued in effect the established seniority practices, and although the boilermaker employees were not covered by the contract, the Company and CSPU orally agreed that bumping privileges should be extended to the boilermaker employees until the representation question was settled (R. 8; 60–61). In addition, shortly after the execution of the contract, the Company announced that "in the interest of fair treatment and to avoid any possible feeling that the Company is discriminating against the employees involved in the representation proceeding," wage increases and working condition

changes reflected in the new contract would be extended to boilermaker employees (R. 62). The Company again explained that the exclusion of the boilermaker employees from the contract had been necessitated by "the Company's legal duty to refrain from recognizing any union as the exclusive bargaining representative of the employees in the boilermaker * * * [department] until the question of such representation is determined in accordance with N.L.R.B. proceeding" (*ibid.*). No arrangement was made, however, respecting the application to the boilermaker employees of the contract provisions for permanently transferring from one department into another (R. 8; 60–61).

Following the Board's Direction of Election on August 20, 1957, the question of the effect the election would have on the established seniority system came into prominence. On September 12, CSPU sent a letter to the boilermaker employees in which it explained (R. 67) that union contracts creating seniority rights can cover only the employees and the unit that the union is entitled to represent, and that, if the boilermaker department were constituted as a separate unit, boilermakers could no longer have the same rights in the labor pool as under the former CSPU contract.

The Company similarly expressed its concern over the same problem during a conference between the Board's representative and attorneys for Local 483 and CSPU on the eve . the election. The Company's attorney stated during the conference that in the Company's view it would be required to treat all employ-

ees who were permitted to vote in the craft severance election as members of the boilermaker unit in the event that the vote was for separate representation, and that the question of voting eligibility thus would govern whether boilermaker employees temporarily working out of the labor pool would be entitled to enjoy the seniority provisions of the contract covering the O & M unit (R. 73–74). In accordance with this position the Company challenged the ballots cast at the election by the boilermakers who had been bumped back into the pool. As the Company explained in its statement of position to the Regional Director respecting the challenges (R. 78):

> * * * [The Company] does not take any position with respect to the eligibility of the challenged voters. The purpose of the challenges was to obtain, through Board procedure, a ruling with respect to which bargaining unit each challenged voter belonged in the event a separate boilermaker bargaining unit resulted from the election. * * * Those challenged voters who are ruled eligible to vote, and necessarily therefore fall in the boilermaker bargaining unit, will have to be laid off because there simply is no boilermaker work available for such employees. * * *

Local 483 also filed a statement of position respecting the challenged ballots in which it urged that the boilermaker employees who had been bumped back into the labor pool were properly a part of and should be permitted to vote in the boilermaker unit (R. 76). Local 483 stressed that a work assignment resulting from

bumping back into the labor pool, "regardless of duration, is of a temporary nature" (R. 76).

In a further attempt to obtain determination of its legal obligations respecting the boilermaker employees following the election, the Company filed with the Board a motion for clarification of the Decision and Direction of Election. The motion requested that the Board more specifically define the boilermaker unit "and the authority of any labor organization certified to represent such unit so that it will be clear that such labor organization may bargain collectively only for employees in the boilermaker department * * * and not with respect to their employment in any other jobs at work. * * *" (R. 95). The motion was denied shortly before the Board overruled the challenges to the ballots of the boilermakers who had been bumped back into the labor pool (R. 135, 99).

In October and November, 1957, during the pendency of the foregoing matters before the Board, an employee in the boilermaker department who had been bumped back into the labor pool, E. C. Jones, attempted first to bid out of the boilermaker department and into the labor pool, for which there was no provision in the seniority system, and then to bid into another department. As stated above, the contract governing such bids then in effect in the O & M unit specifically excluded employees involved in the boilermaker craft severance proceeding, and Jones's bid was denied (R. 9; 107–108). In February 1958, four other boilermaker employees similarly situated with Jones attempted to bid into another department, and their bids were similarly denied (R. 9–10; 22;

107, 112–114). If the boilermaker employees had been covered by the O & M unit contract, the bids of four of the five employees, including Jones, would have been accepted (R. 114). CSPU expressed its opposition to such bidding attempts in a letter to the Company in connection with Jones's bid. The letter stated that the boilermaker employees had been deliberately excluded from the contract in order to avoid the commission of an unfair labor practice, and that they therefore could not properly invoke the provisions of the contract respecting departmental transfer (R. 110–111).

On April 17, 1958, the day following the issuance of the final tally of ballots and the certification of Local 483 as the bargaining representative of the separate boilermaker unit, the Company, in accordance with its understanding of its legal obligations, notified the 17 boilermaker employees then working out of the labor pool that they would be replaced by laid-off employees in the O & M unit who were covered by the seniority provisions of the contract with CSPU. The notification letter explained that (R. 105):

> Because of the recently concluded NLRB representation proceedings, in which you were involved as a member of the boilermaker group, you are expressly excluded from the agreement with CSPU, Local 115, and therefore have no seniority under such agreement. * * * Under the circumstances the company feels that it has no alternative to laying you off from non-boilermaker work to which others have contractual seniority rights.

CSPU had two days earlier sent the Company a letter stating that the Board's certification of the separate craft unit would bring to an end the oral understanding under which the boilermaker employees had been accorded bumping rights into the labor pool, and that it expected strict compliance thereafter with the seniority provisions of the contract, which excluded boilermaker employees from its coverage (R. 101–103).

B. THE BOARD'S CONCLUSIONS AND ORDER

Charges were filed with the Board alleging that the layoffs of the 17 boilermaker employees in the labor pool, and the denial of transfer bids by some of them, violated Sections 8(a)(3) and 8(b)(2) of the Act, in that such action discriminated against the employees because of their selection of Local 483 as their representative. The Board, overruling the Trial Examiner, concluded that the Company and the CSPU had not acted unlawfully. The Board found that the layoffs were attributable, not to the boilermaker employees' selection of a particular union, but rather to the fact that the seniority arrangement was only applicable to the O & M unit and the boilermaker employees (including those who were in the labor pool) had elected to leave that unit. In the Board's view, neither the Act nor the contract with CSPU required that the seniority agreement applicable to the O & M unit be extended to employees outside that unit. The Board further found that the denial of transfer bids to the boilermakers during the pendency of Local 483's representation petition

was consistent with the Company's obligation to maintain neutrality until the question as to which union was to represent the boilermakers had been resolved. Accordingly, the Board ordered the complaints against the Company and CSPU dismissed in their entirety. (Pet. A6–16.)

C. THE DECISION OF THE COURT OF APPEALS

The court below (Judges Phillips, Prettyman and Bazelon), in a *per curiam* opinion, upheld the Board's decision that the Company and the CSPU had not violated the Act. The court stated: "This case reflects the difficult situations which often arise when craft severance requires readjustment of a highly complex seniority system. We think the Board's resolution is a reasonable one and reflects a proper accommodation of the interests which the Act seeks to serve." (Pet. A4.)

ARGUMENT

The issues in this case concern the effect of a "craft severance" election on the complex "bidding," "bumping," and "labor pool" arrangements prevailing at the Wood River plant. Presenting no question of general importance in the administration of the Act, these issues were resolved by the Board in accordance with settled principles, not in conflict with the decisions of this Court or of any court of appeals.

1. The employees here involved were "junior" boilermakers who by virtue of their relative lack of seniority were working out of the labor pool rather than as boilermakers at the time of the election. Nevertheless, as petitioner Local 483 itself successfully

insisted before the Board, they were "boilermakers" qualified to vote in the election, which would determine whether the boilermakers continued to be part of the "O & M" unit, represented by CSPU, with the benefits of the "labor pool" and other aspects of the CSPU contract, or whether they would henceforth be represented by the petitioner, with whatever benefits petitioner as their bargaining representative might obtain for them. Having voted in favor of representation by Local 483 rather than by CSPU, the employees cannot complain because they lost the "labor pool" aspects of CSPU's contract, and, as boilermakers, were laid off, precisely as they would have been if the boilermakers had always been represented by a separate union and not been a part of the CSPU group.[2]

Nothing in *Radio Officers' Union* v. *National Labor Relations Board*, 347 U.S. 17, *Brotherhood of Railroad Trainmen* v. *Howard*, 343 U.S. 768, or *National Labor Relations Board* v. *International Association of Machinists*, 279 F. 2d 761 (C.A. 9), certiorari denied, 364 U.S. 890, relied on by petitioners (Pet. 10–11), conflicts with this result. In the *Radio Officers* case, union members within the bargaining

[2] See Jones, *Self Determination vs. Stability of Labor Relations*, 58 Mich. L. Rev. (1960) 313, 335:

"Employers who believe that the craft employees have not gained from severance cite most often as the reason for their belief the loss in job security. Where severance has occurred, the craft workers have had their 'bumping' rights restricted to their particular units. In several instances, this had led to the layoff of skilled workers, whereas, formerly, they could have displaced workers in less skilled jobs."

unit received higher wages than non-members in the same unit. Nothing in the decision suggests that employees in different units must receive the same wages,[3] or must be able to "bump" from one unit to another. The *Howard* case held that a bargaining representative under the Railway Labor Act could not use its power to destroy the jobs of Negro porters in a unit represented by another union when the only motivation for the representative's action was the race of the employees. Nothing in the decision implies that the employees in the porters' unit had a right to jobs in the trainmen's unit in the event of a porter's layoff. In the *Machinists* case, employees who left the bargaining unit received differing treatment depending upon whether or not they exercised their statutory right to select a bargaining representative. In the instant case employees who left the unit represented by CSPU would have no right to a job in the "labor pool" serving that unit, whether they went to a boilermakers unit or to any other unit whether or not represented by a labor organization.

In short, the flaw in petitioner Local 483's position is that the labor pool rights it seeks were among the fruits of a contract applicable to members of the O & M unit. Having voted to leave that unit, the boilermaker employees voted themselves out of the labor pool, apparently preferring to forego the benefits of CSPU representation (including the labor pool) in favor of the benefits of representation by Local 483.

2. Realizing that its claim for labor pool rights must necessarily arise out of contract, Local 483 urges (Pet.

[3] See *Anheuser-Busch, Inc.*, 112 NLRB 686, 690.

11–12) that the Company violated the Act when it refused, after the petition for severance of the boilermakers was filed with the Board, to continue bargaining with the CSPU respecting the boilermaker employees and to include those employees in the new contract negotiated with CSPU. This contention fails for three reasons. First, settled law establishes that an employer should not bargain with a union respecting certain employees while a question is pending before the Board as to whether that union represents those employees. See, *e.g.*, *National Labor Relations Board* v. *National Container Corp.*, 211 F. 2d 525, 536 (C.A. 2); *Elastic Stop Nut Corp.* v. *National Labor Relations Board*, 142 F. 2d 371, 380 (C.A. 8), certiorari denied, 323 U.S. 722; *National Labor Relations Board* v. *Crowley's Milk Co.*, 208 F. 2d 444, 446 (C.A. 3); *Hoover Co.* v. *National Labor Relations Board*, 191 F. 2d 380, 386 (C.A. 6).* Second, the Company preserved the very "neutrality" peti-

* The recent decision of the Seventh Circuit in *St. Louis Independent Packing Co.* v. *National Labor Relations Board*, 48 LRRM 2469, on which petitioners rely (Pet. 11–12), is in accord with this settled law. To be sure, the court there held that the employer did not have to "hold back" until he was satisfied that a "real question" was presented, and this point was not reached until the Board had directed an election on a pending petition. However, Local 483 is in no position to argue that its representation petition filed with the Board did not raise a "real question" concerning representation. In any event, even if the Company should have waited until the election was directed before excepting the boilermaker employees from the negotiations with CSPU, no prejudice resulted from its premature action for the first denial of job bids by boilermakers did not occur until well after the Board election (pp. 8, 10, *supra*).

tioners demand (Pet. 12) when it permitted boilermakers to bump into the labor pool during the pendency of the representation proceeding and until the Board's certification of the boilermaker's unit.[5] Third, whatever contractual arrangement the Company might have made with respect to the right of boilermakers to participate in the O & M unit labor pool during the pendency of the representation proceeding would necessarily terminate when the boilermakers formally left that unit and formed their own, i.e., when the Board certification issued. It should also be noted that the evidence in this case does not suggest, nor do the petitioners contend, that the Company's refusal to bargain with CSPU respecting the boilermaker employees was motivated by a desire for reprisal against them for seeking craft severance.

3. On no firmer footing is petitioners' further contention (Pet. 13–17) that, if the Company and CSPU could exclude the boilermakers from their new contract, the most that they could do was to define the exclusion in terms of jobs rather than in terms of those eligible to vote in the craft severance election. It was Local 483 that persuaded the Board that the boilermaker unit should consist not only of those employees who were then doing boilermaker work but also those boilermakers who were then temporarily in the labor pool of the O & M unit. As a result, because

[5] During this period, however, the Company did not permit bidding out of the boilermakers group, for such activity (as contrasted with mere bumping into the labor pool on a temporary basis) would have altered the composition of the unit during the pendency of the representation proceeding.

of the necessity of the Company's maintaining neutrality vis-a-vis persons involved in a craft severance election, CSPU could not bargain with the Company on behalf of any of the boilermakers. And yet Local 483 would now have employees for whom CSPU was not permitted to bargain become the beneficiaries of the CSPU agreement—at the expense, indeed, of CSPU members for whom that union *was* bargaining.[6] Petitioners suggest no basis in either reason or precedent for thus turning bargaining procedures and representation responsibilities upside down and thereby making even more complicated "the difficult situations which often arise when craft severance requires readjustment of a highly complex seniority system" (Pet. A4).

4. In summary, the right of craft severance which petitioner successfully espoused in this proceeding necessarily encompasses a choice between the benefits of craft and those of industrial organization. Having chosen the former, the boilermakers in this case sacrificed the latter. Local 483, having successfully urged that the boilermakers temporarily in the O & M labor pool were eligible to vote as boilermakers in the severance election, cannot complain because, following the severance of the boilermakers from the O & M unit, the labor pool jobs were filled by employees remaining in that unit.

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[6] The benefits in question—being able to bid for, or temporarily to bump into, jobs elsewhere in the O & M unit—necessarily operate in derogation of the interests of other less senior members of the O & M unit, substantially all of whom (except for the boilermakers) are represented by CSPU.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1961

LOCAL 483, INTERNATIONAL BROTHERHOOD OF BOILERMAKERS, IRON SHIP BUILDERS, BLACKSMITHS, FORGERS & HELPERS OF AMERICA, AFL-CIO, RALPH SCHOEN, ET AL.,

v.

NATIONAL LABOR RELATIONS BOARD, *Respondent*,
and
STANDARD OIL COMPANY,
and
CENTRAL STATES PETROLEUM UNION, LOCAL 115,
Intervenors.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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REPLY BRIEF FOR PETITIONERS TO BRIEF IN OPPOSITION

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1. The Board's attempt (Op. p. 16, n. 4), to explain away as non-prejudicial the conflict with *St. Louis Independent Packing Co.*, is misleading. The May 3, 1957, contract was entered into three and a half months

before the Board directed an election (Op. 7, 5). If boilermakers had not been excluded from that contract there would have been no basis for denying them "bidding" privileges before, and ousting them from labor pool jobs after, Local 483 was certified (Op. 11-12). If boilermakers had been included subject to termination in the event Local 483 was certified, the provision for termination would have been unlawful for the reason stated by the Seventh Circuit (Pet. 12). The difference between that and postponing the effect of exclusion by a "gentlemen's agreement" is one of "verbal ritual" on which "[s]ubstantive rights and duties in the field of labor management do not depend." *NLRB* v. *Rockaway News Supply Co.*, 345 U.S. 71, 75.

2. Refusal to distinguish between CSPU's exercise of power to oust boilermakers from labor pool jobs and CSPU's lack of authority to control future transfers to and from jobs in the boilermaker unit newly created by the certification is not a consequence of any complexity in the seniority system, but of a basic misconception of the significance of *Howard, Radio Officers* and *Machinists*. The rationale of those cases is that an exclusive bargaining agent is forbidden ever to use a "discriminatory bargaining device" against "other workers," whether it represents them or not. 343 U.S., at 774-775. Of course, denial of job opportunities and other disparities resulting from the agent's lack of authority over terms and conditions of employment in jobs outside its unit are not products of discriminatory bargaining. It is certainly true, therefore, that "Nothing in [*Howard*] implies that the employees in the porters' unit had a right to jobs in the trainmen's unit in the event of a porter's layoff" (Op. 15). By the same token, nothing in petitioners' position implies that

boilermakers laid off from boilermaker jobs after the certification would have a right to "bump" into the CSPU unit. But loss of power over severed jobs does not license discriminatory exercise of power which the agent retains. If ouster of "porters" to make room for "brakemen" was the product of a "lawless invasion [ ]" (343 U.S., at 774), then *a fortiori* ouster of boilermakers to make room for non-boilermakers was too. There is irony in the Board's attempt to escape the conflict with *Howard* by implying (Op. 15), that the ban against discrimination based on race is somehow more rigid than the ban against discrimination based on protected union activity.

3. Time and again the Board says (Op. 15-16, n. 4, 17-18), that Local 483 should be barred from complaining because if it had not filed the petition and induced the Board to follow its usual practice of holding temporarily laid off employees eligible to vote the discrimination would not have occurred. But if Local 483 had a right to do this it is difficult to understand by what authority the Board presumes to withhold protection from its exercise. In any event, the rights involved are "personal rights" (*Shelly* v. *Kraemer*, 334 U.S. 1, 22; *Republic Aviation Corp.* v. *NLRB*, 324 U.S. 793, 798, 805), and the individual petitioners, at least, cannot be barred.

The Board's adoption of the CSPU-Standard contention (cf. Op. 14 with Pet. 7), that the individual petitioners are not entitled to complain because if they had not voted for Local 483 they would not have been ousted from their jobs highlights the need for certiorari. It was to prevent employers and unions from

posing precisely such dilemmas to employees that Congress guaranteed protection against discrimination. The Board's denial that the question is important (Op. 13), should be judged against its non-denial that the effect of treating this manufactured dilemma as an incident of choice between craft and industrial unionism (Op. 18), is to empower opponents of severance to defeat it.

Respectfully submitted,

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